

Questioning Questions: Objections to Form in the Interrogation of Witnesses

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INTRODUCTION

During the courtroom interrogation of a witness, questions can be framed in ways which are objectionable without reference to the content of the answers being elicited. The objection is to the form of the question and not to the substance of the desired answer. This is an important subject to trial lawyers; a good part of a litigator's professional life is spent framing questions and monitoring those asked by his opponents in court. Yet this process makes even the most experienced practitioners and judges uncomfortable. Though many attorneys and judges believe they are proficient in framing proper questions, making objections to improperly asked ones or ruling on such objections, they share a pervasive insecurity about the reasons behind their intuitive performance.¹ Their theoretical knowledge is inadequate to rationalize, describe or enhance their per-

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1. We perceive the actual situation in the courtroom as sometimes like a game of poker in which all the players hold low hands and all are bluffing. The necessity of running the bluff springs from a feeling by each participant that there are mechanical rules lurking somewhere which only he has somehow missed picking up, and that showing a lack of knowledge of those rules would brand him forever an incompetent at the basics of litigation. Lawyer 1 asks a question. Lawyer 2 doesn't like the question for an instinctive reason, so he rises and says "objection". Lawyer 1 immediately thinks "what have I done wrong—what does he know that I don't know"? The Judge, not knowing exactly what is challenged but not wanting to admit it, may either rule instinctively but positively on the general objection, or he may call for the statement of a ground for the objection. The objector may respond "leading question" not knowing why exactly, but being careful to sound forceful and sure. Lawyer 1 may now say, without a clear reason why, but with equal force and certainty "this situation clearly falls within an exception to the leading question rule." Now it's lawyer 2's turn to get butterflies over what lawyer 1 knows that he doesn't. The judge, still not knowing exactly what is going on but being very sure he'll never show that in public, may again either rule, or say "what exception" with a variety of forceful intonations. And so on. The dialogue may never condescend to an identification of the real issues involved, because to do so one player or another might have to admit to a confusion he feels is unprofessional. But, as this article hopes to make clear, mechanical rules don't really exist on these issues so that uncertainty is inherent in dealing with them. Open discussion structured by that realization would be much more conducive to the policies of our trial system.

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formance in this area, and the more we examined the situation the more we realized the limits of our own understanding.

The extant literature is of little aid to anyone's understanding. When we began to examine the various problems associated with objections to the form of questions, we were startled at the paucity of careful analysis on the subject to be found in print, both in the journals and in judicial opinions.² Wigmore dealt with the subject but only in a somewhat haphazard fashion, yet nothing more comprehensive has been written in the last forty years.³ Sparks of brilliance on isolated bits and pieces

2. Despite their practical impact on litigation, there seems to be a common disdain for objections to the form of questions among academics and some judges. The attitude that such objections are not worth considering comes through clearly in the following excerpt from a recent treatise on the Federal Rules of Evidence.

With the exception of leading questions, the law of evidence has little to say about the proper form of interrogation. Yet despite what the books may say, every court has a collection of stock objections to the form of the question that will be honored in that court, in no place else. Indeed in some courts most of the objections made are of this variety. "Asked and answered," "argumentative," "compound," "assumes a fact not in evidence" are just a few examples; one judge even sustained an objection to a line of questioning on the grounds it was tedious! (It was.)

Federal Rule 611(a) leaves the method of interrogation to the discretion of the judge and nowhere does it authorize these old objections to the form of the question. Obviously a mere statute passed by Congress and signed by the President is not going to change the way lawyers try their cases. And so long as everyone recognizes that the judge is exercising a discretion, these time-honored "objections" are a harmless verbal shorthand, however startling they may be to the lawyer encountering one of them for the first time. 21 C. WRIGHT & K. GRAHAM, *FED. PRACTICE & PROCEDURE, EVIDENCE* 128-29 (1977) (hereinafter cited as WRIGHT & GRAHAM).

Perhaps this attitude accounts for the paucity of scholarly discussion of the questioning process. See note 3 *infra*. Needless to say, we do not share the disdain, nor do we share the attitude reflected in the quote that an invocation of judicial discretion is a solution to problems rather than the mere identification of the kind of problem involved. See text at notes 6 *infra*, *et seq.*

3. J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1st ed. J. Mill 1827) (hereinafter cited as J. BENTHAM) contained much detailed, interesting and quirky observation on the legal questioning process. In the twentieth century only Wigmore has covered the ground with anything like care, and Wigmore omits discussions of ambiguity, compound questions, questions which are too general and other commonly invoked grounds of objection to the way questions are framed. Further, the 40 years intervening between Wigmore's Third Edition of his *TREATISE ON THE LAW OF EVIDENCE* and today make a review of his positions appropriate. J. WIGMORE, *TREATISE ON THE LAW OF EVIDENCE* (3d ed. 1940) (hereinafter cited as 3 WIGMORE.) (Where cited the text of the third edition is intended, but in all relevant citations this is presented in the J. Chadbourn revisions.) Since Wigmore, there have apparently been no journal articles devoted to objections to the form of questions though a few have touched the subject in passing. See, e.g., Maxwell, *I Object*, 46 N. DAK. L. REV. 203 (1970). The approach undertaken is usually little more than a checklist. The same is true of the treatment of the subject in the standard case books and trial manuals. See D. LOUISELL, J. KAPLAN & J. WALTZ, *CASES AND MATERIALS ON EVIDENCE* 10-19 (3d ed. 1976) (hereinafter cited as LOUISELL, KAPLAN, & WALTZ); R. KEETON, *TRIAL TACTICS AND METHODS*, 140, 148, 171-75, 184 (2d ed. 1973) (hereinafter cited as R. KEETON); H. BODIN, *CIVIL LITIGATION & TRIAL TECHNIQUES*, 326-30 (1976); R. McFIGG, R. MCCOLLUGH & J. UNDERWOOD, *CIVIL TRIAL MANUAL* 1406-12 (1974). Some authors give the process almost no treatment. C. McCORMICK, F. ELLIOTT & J. SUTTON, *CASES AND MA-*

of the topic appear in various sources,⁴ but no coherent attempt has ever been made to examine comprehensively the concepts relating to the proper formation of questions put to witnesses during trial. We decided to try, and, therefore, the main object of this article is to explore thoroughly the principles which should guide attorneys and judges in their consideration of the form of trial questions.

From the beginning we attempted to relate our ideas directly to the context of courtroom questioning, but inevitably we ran into the problem of control. One primary objective of the examination process is to control the bad effects of bad questions. Whenever we turned for guidance on how this control is exercised, however, we repeatedly discovered not an answer but a slogan: "The control of the questioning process rests in the sound discretion of the trial judge."⁵ The phrase sounds appropriately judicial, but extended reflection convinced us of how little we actually knew about its meaning. Worse yet was our suspicion that we were not alone. Most often it seems to be a catch-phrase relied upon as a substitute for reasoning, rather than a result reached by a process of critical analysis. Because of this problem we will make a few preliminary observations on "discretion" in order to establish the proper context for the material which follows.

DISCRETION AND HOW IT IS CHECKED BY PRINCIPLE

We are used to speaking of the criteria bearing on a judge's decision as "rules," but the concept of a rule is a difficult one and can lead to great confusion when we see decisions made in ways that do not seem to be according to "rules." If a decision is not "controlled" by a "rule," then it is said to be within the judge's "discretion."

Actually, to say a decision must be "controlled" by a rule is the narrowest possible idea of a rule, what we may call a mechanical or perfect rule.⁶ A perfect rule may conveniently be thought of as a command

TERIAL ON EVIDENCE ch. 7 (4th ed. 1971); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (2d ed. 1972) (hereinafter MCCORMICK refers to this edition, unless otherwise noted) devotes only a few pages to the issues, mostly summarizing Wigmore. Slightly more thorough is E. HEAFY, CALIFORNIA TRIAL OBJECTIONS (1967). By far the most detailed of these checklist sources is B. JEFFERSON, CALIFORNIA EVIDENCE BENCH BOOK (1972). Bits of the topic are touched upon in a few other articles. See sources cited at note 4, *infra*. Only C.J.S. approaches real comprehensiveness in its usual pack-rat-thorough unanalyzed manner. 98 C.J.S. Witness §§ 315-429 (1978).

4. See the treatment of leading questions by judges in Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judges*, 64 U. VA. L. REV. 1, 52 (1978), and the exposition of the problem of requiring "yes or no" answers to questions asked on cross examination found in K. HUGHES, EVIDENCE (Massachusetts Practice Series) pp. 199-200.

5. This is so common as to be beyond the necessity of citation. See the quote from WRIGHT & GRAHAM, note 2 *supra*.

6. The nature of such basic concepts as that of a rule is the subject of much debate in

which controls a decision without the necessity of any kind of discretion. It ideally consists of an "if" part and a "then" part. The former tells when the rule applies, and the latter tells the result of the rule's application. To qualify as a "perfect" rule both clauses must be exact and unambiguous. Consider this example: "If a man comes into the garden of Zeus, his right hand shall be cut off, no more, no less." To make this a perfect rule, we must provide exact and empirically unmistakable definitions of "a man," "the garden of Zeus," "coming into," "right hand," "his," "cut off," and where the hand stops and the wrist begins. Of course, language is inherently inexact at the edges, and it is debatable whether a "perfect" rule is even possible in the real world.⁷

There was perhaps a time when lawyers liked to think of the law as a great collection of mechanical rules.⁸ Indeed, some rules like the rule against perpetuities, which approaches the mechanical model, have been formulated and utilized in the law. No one today, however, believes a complete system of mechanical rules is possible or desirable. Mechanical rules may have a place in some contexts,⁹ but in many situations attempts

modern legal philosophy. See generally T. BENDITT, *LAW AS RULE AND PRINCIPLE* (1978); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1968); Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1971) and Greenwalt, *Discretion and the Elusive Quest for the Fetters that Bind the Judge*, 75 COLO. L. REV. 357 (1975); Raz, *Legal Principals and the Limit of the Law*, 81 YALE L.J. 823 (1971).

In using the phrase "perfect rule" we of course do not mean to imply that such a rule is necessarily perfect in the sense of being wise or appropriate. The opposite is maybe more often the case. It is perfect only in its essence as a rule. In this regard we see that the core concept of a rule may be synonymous with the concept of "mechanical."

7. See the discussion in H. HART, *THE CONCEPT OF LAW* 125 (1961).

8. Dworkin argues that there was never a time when lawyers actually conceived of the law according to such a "mechanical jurisprudence," because no one has ever pointed out any specimen of a lawyer who, on examination, did not recognize some problems and limits on such a conceptual approach. R. Dworkin, note 6 *supra*, at 14, 15. Yet this argument may miss the point. More important than any perfect specimen of a mechanical jurisprudence is the center of gravity of thinking of the legal community, how far it tends towards indulging this conceptual frame of reference in its less reflective moments, and how strongly it preserves the general approach even while recognizing problems. Viewed this way, it is fair to say that the late nineteenth century was an era of mechanical jurisprudence.

9. In this sentence we fall into an elipsis which demands comment to head off either confusion or criticism or both. We have used the term "mechanical rule" in a different sense than heretofore. In previous passages "mechanical rule" meant a "perfect rule" and was said to be probably unattainable in reality. It defined one end of a continuum, and a point which reality could only asymptotically approach. In the text sentence to which this note is appended we use the term "mechanical rule" to mean a category of rule structures imposed on the continuum at the mechanical end of attainable reality. Such uses of the same term to mean both an ideal and that category of the real world most closely approaching the ideal is very common. The reader may recognize an overtone of it in the varying uses of the term "mechanical jurisprudence" in the footnote immediately preceeding. It can lead to confusion and wasted energy arguing at unperceived cross purposes. It is also in practice unavoidable without using repetitive and inelegant qualifying phrases. Suffice it to say that the reader will generally be able to tell what sense is intended from the context.

at mechanical specificity cannot be comprehensive enough to reflect all the considerations we think should go into a just result.

No mechanical rules "control" a judge's decision when ruling on the form of questions. In the absence of an attempt at a system of such rules, we are used to saying that a decision is in the judge's "discretion." This is neither the time nor the place, however, to launch a detailed analysis of the various shades of "discretion" a judge can have absent mechanical rules.¹⁰ It is enough to say that even without such rules the judge is nevertheless obligated to consider certain things honestly and completely in arriving at a decision. Absent mechanical rules, we will call those considerations, "principles."¹¹ Principles form and limit discretion, which may be said to range from open to constrained¹² depending on the specificity and the level of exposition of the principles which structure it. In theory, the more specific the body of legitimate governing principle the decision maker must take into account in guiding his decision, the more constrained the discretion.

We say "in theory" because practical reviewability presents another dimension which must be considered in addition to the theoretical specificity provided by structured principle. For various reasons, usually involving considerations of efficiency or reflecting the superior position of the trial judge in making relevant clinical observations, initial decisions may be treated as virtually unreviewable. Although many people confuse

10. The nature of the concept of discretion is also a current topic of hot debate. The sources cited in note 5 *supra*, will provide the interested reader with an entrée to that debate.

11. By thus utilizing the term "principle" we have once again entered the territory of the ongoing debate alluded to in notes 6 & 8, *supra*. The way we have used the term would not be satisfactory to Dworkin, since we have included within the scope of the concept much that he would have called "rule". See Dworkin, *The Model of Rules*, *supra* note 6. Yet Dworkin's analysis is not without its critics, who have claimed that much of what he calls principle can be fit within a proper concept of rule. See Raz, note 6 *supra*.

We do not wish to join this debate. We have tried to divide between rule and principle for the purpose of this article to highlight the structured and restricted nature of the process of making decisions on "discretion". Perhaps there are other, more subtle, distinctions to be drawn for different purposes, but they are beyond the scope of this article. If the distinction we have made helps our readers develop a conceptual raft with which to avoid the scylla of "discretion as license" and the charybdis of "law as mechanical rules," that is enough. It is not that we think most people do not recognize those positions as untenable. It is that we think most people have difficulty describing to themselves a middle position with any clarity. Helping the reader find such a middle ground is all we hope to do.

12. We have used the terms "open" and "constrained" to avoid the problems of the traditional terms "broad" and "narrow" which have always sounded as if discretion was unburdened and unstructured within its properly defined scope. We have consciously avoided using the terms "strong" and "weak" which have been used by Dworkin to make a related but importantly different distinction. See Dworkin, *The Model of Rules*, note 6 *supra*.

Other writers have used even different descriptive dichotomies. See Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971) ("primary" and "secondary").

this circumstance with discretion,¹³ this phenomenon is not discretion in any principled sense.¹⁴ Because many decisions are subject to a great amount of structuring principle the trial judges may theoretically be subject to a very constrained discretion when making them, while the results of their actions may be virtually unreviewable. In this kind of situation, the trial judge has a great duty of care to apply responsibly the principles which limit his discretion. It is an especially great breach of duty for the judge to lose sight of structuring principle in reaching a decision merely because no matter what he does he will most likely not be reversed because of this practical "discretion," based on unreviewability.

One pernicious aspect of the invocation of "judicial discretion" as a slogan is that it inhibits the exposition and growth of a system of principle which properly should form and constrain that discretion.¹⁵ We believe the best system of discretion is the one most refined in the structure of its principles. Although inchoate principles exist in the area of control of the questioning process, their exposition has not been undertaken with appropriate structure or clarity. It is toward this task that we now turn. What we say below should be read as an attempt to expose a system of principle, which limits and structures the "discretion" of judges in deciding basic issues of question formation which arise thousands of times a day in courtrooms across the country.

THE QUESTIONING PROCESS

The way a question is framed always affects the substance of the an-

13. See *Palliser v. Home Tele. Co.*, 170 Ala. 341, 54 So. 499 (1911) quoted as authority on the point in R. SNEAD, "JUDICIAL DISCRETION" (1978) (materials prepared for the National Judicial College).

14. One can easily illustrate the distinction between practical reviewability and discretion. If we send you to count the number of humans who cross a certain line on a sidewalk between noon and 1:00 p.m. on a given day, your job is the mere application of a rule as near to being purely mechanical as we are likely to see. You have no discretion in any principled sense, yet practically your report to us is unreviewable unless we go to the trouble of setting up independent checks. This is only one kind of circumstance in which decisions may be non-discretionary but unreviewable. Unreviewability, incidentally, seems to be Rosenberg's "secondary discretion." See Rosenberg, note 12 *supra* at 636 *et seq.*

15. We here do not claim to say anything startlingly new, but merely to emphasize something easily lost sight of. Many seem to approach the same point by saying something to the effect that judicial discretion is never to be taken as "unbridled discretion." The main problem has been that the emphasis usually seems to end up on the "discretion" and not on the "bridle." There are indications that we are beginning to examine the characteristics of a proper "bridle" more carefully. See the sources cited at note 4 *supra*, and see especially Rosenberg, *supra* note 12. We must here note that one major stumbling block in fashioning a "bridle" that actually works is the effect of the doctrine specifying that trial judges who rule without exposition will be given the benefit of any doubt if any imaginable proper basis for their ruling exists. This has encouraged silent rulings. Judges who begin to rule without giving explicit reasons will often dispense with feeling obligated to have any reasons. For a criticism of this so called Sphinx School of Judging, see C. WRIGHT & E. GRAHAM, note 2 *supra* at § 5041.

swer. The reason is in part simply a result of the complimentary nature of the concepts of question and answer. The form of a question must in a purely logical sense affect the substance of an answer because the question defines the range of response that can be regarded as an answer. But there is another important way in which the question affects the answer. Behind every question lies the implication that some possible answer to the question is important to the interrogator. The question is an assertion of the importance of the reply. If the world were a seamless web of possible information, and if all we cared about was eliciting all possible information, the process of framing questions could be random and unstructured. No field of human inquiry - the sciences, history, or law - operates in that fashion.¹⁶ Each endeavor has a priority of information it deals with, dictated either by utilitarian concerns or the ends of the discipline. When we have decided what we want to know, the questions reflecting such a priority of information can be framed. In the examination of a witness in litigation, the substantive law generally defines which details of the underlying episode are relevant. Each question must be framed with these material issues of the substantive law in mind. A question is defective if no likely answer could yield information useful in establishing one of the material issues in controversy.

A rule requiring such basic relevancy, however, is not much of a check on the interrogation process. Perhaps the question "do you know why 1066 is a famous date in history?" when asked of the plaintiff in a contract action would almost always be irrelevant in this sense. Most questions, however, especially more general ones, usually admit of some possible answer which can be relevant. In any event, relevancy, although necessary, is not a sufficient end of the questioning process since there are other things which should emerge from it.

We offer the following list of desiderata the questioning process should elicit:¹⁷

16. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

17. Others have offered their own analysis of the virtues to be looked for in questioning, and we do not claim any general superiority of our list over theirs beyond the application for which it is here used. See most notably J. BENTHAM, note 3 *supra* at bk. III, ch 1. Bentham identified seven characteristics that he felt should be common to all testimony:

1. *Responsive*; that is obtained by questions put to the witness.
2. *Particular*; that is, special, individualized.
3. *Distinct*; nothing ambiguous or equivocal, neither in the order of the facts, nor in the expression.
4. *Given with reflection*; the witness should be allowed the time and assistance necessary to recall the facts and to state them without precipitation.
5. *Unpremeditated*; that is produced by sudden and unforeseen questions; but that testimony should be unpremeditated appears incompatible with its being given with reflection.

1. All the relevant information previously perceived and remembered by the witness.
2. Information without too many irrelevant details.
3. Testimony in the witness' own spontaneous words. Thus, possibilities of mistake or deception, which even the witness might not have noticed, will in the spontaneous roughness of the answer, be revealed for further exploration.
4. Answers which are put forth with sufficient clarity that the jury will not be confused about what is being asserted by the witness.
5. Information with as little editorial comment or forensic argument from the examiners as possible during the questioning process.

These are the institutional goals. How might these criteria conflict with the self-serving goals of one side or the other in the adversary process? Each advocate probably desires for himself as much editorial freedom in the questioning process as he can get. Taking this reality as a constant, how are the other institutional goals likely to be affected by the actions of individual attorneys to achieve a given result?

- A. If the witness is strong, the proponent wants what the system wants. But the opponent desires, (1) omissions of relevant information, (2) irrelevancies to submerge the relevancies, and (3) as much confusion as possible.
- B. If the witness is weak, the proponent wants to do what will improve the story, including asking questions which may create false memory and plaster over cracks in the story as smoothly as possible. The opponent, however, has the same goals as the system.

The striking thing about this observation is that, if a proponent puts up a reasonably good witness, the side with impetus to act inconsistently with the institutional goals of the questioning process is the cross-examining side. Yet, the accepted generalization is that virtually nothing limits the form of questions asked on cross-examination. In fact, many of the principles of fair questioning discussed below apply as strongly, if not more strongly, to questions on cross-examination as well as to those on direct examination. Even the prohibition on improper leading has often overlooked applications to cross-examination.

LEADING QUESTIONS

All questions are somewhat leading, and few questions inevitably lead improperly in every context. A no-leading-question rule therefore does not exist, at least in the mechanical sense. There is, however, a principle: There shall be no improper leading of the witness.

Since every question provides direction for the answer the problems

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6. *Not suggested in any undue manner*; that is, the witness should not be aided and led in his answers by suggestions, which put him in the way of deceiving the judge.
 7. *Assisted by allowable suggestions*; that is, by questions whose only aim is the direct memory.

of improperly leading questions are not unique to the law. For instance, for an historian:

[A] question should be open ended, but not wide open. It should dictate the kinds of fact which will serve to solve a problem without dictating the solution itself. It must be a genuinely interrogative statement, but at the same time it must guide the inquiry through masses of information. If it does not perform the latter function, the historian will share Alice's confusion, as she went a wandering in Wonderland:

"Cheshire-Puss", she began, rather timidly . . . "Would you tell me, please, which way I ought to go from here?" "That depends a good deal on where you want to go to," said the Cat. "I don't much care where—" said Alice, "Then it doesn't matter which way you go," said the Cat."¹⁸

Judicial interests in accurately developing a witness' knowledge and the need to make efficient use of time serve to justify some level of leading. "If interrogation did not lead, a trial would get nowhere."¹⁹ Thus, the guidance of a witness to some degree is permissible and encouraged. The degree of direction which should be allowed is always the difficulty. Efficiency alone, however, certainly does not justify all leading questions. Consider the following example of efficient leading questions as reported by Sir Henry Hawkins.

Let me illustrate it by a trial which I heard: Jones was the name of the prisoner. His offense was that of picking pockets, entailing of course, a punishment corresponding in severity with the barbarity of the times. It was not a plea of "Guilty", when, perhaps, a little more inquiry might have been necessary; it was a case in which the prisoner solemnly declared he was "Not Guilty", and therefore had a right to be tried. The accused having "held up his hand", and the jury having solemnly sworn to hearken to the evidence, and "to well and truly try, and true deliverance make", etc., the witness for the prosecution climbs into the box, which was like a pulpit, and before he has time to look around and see where the voice comes from he is examined as follows by the prosecuting counsel:

"I think you were walking up Ludgate Hill on Thursday, 25th, about halfpast two in the afternoon and suddenly felt a tug at your pocket and missed your handkerchief, which the constable now produces. Is that it?" "Yes Sir". "I suppose you have nothing to ask him?" says the judge. "Next witness". Constable stands up. "Were you following the prosecutor on the occasion when he was robbed on Ludgate Hill, and did you see the prisoner put his hand into the prosecutor's pocket and take this handkerchief out of it?" "Yes Sir." Judge to prisoner: "Nothing to say, I suppose?" Then to the jury: "Gentlemen, I suppose you have no doubt. I have none." Jury: "Guilty, my lord", as though to oblige his lordship. Judge to prisoner: "Jones, we have met before—we shall not meet again for some time—seven years' transportation—

18. D. FISCHER, *HISTORIANS FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 38 (1970) (hereinafter cited as D. FISCHER).

19. *State v. Abbott*, 36 N.J. 63, 78, 174 A.2d 881, 889 (1961).

next case." Time: Two minutes, fifty-three seconds."²⁰

The principle prohibiting improper leading springs from a desire to have a witness' information put forth in his own words. The principle has deep historical roots. The Emperor Trajan deemed what we would call leading questions to be improper interrogation in the second century,²¹ while the label "leading" dates from at least as early as Coke's IV Institute.²² Yet, what is intended by the term has not been analyzed satisfactorily, and there has been protean confusion concerning the dangers at which the principle is aimed. This uncertainty is due to the fact that the prohibition against improper leading entails two separate principles aimed at two separate dangers: 1) There shall be no improper suggestion and 2) There shall be no improper ratification. Usually only the danger created by suggestion is discussed, with problems of ratification, if noted at all, being viewed as a component of suggestion.²³ We believe improper ratification is by far the more common problem and the more important to understand, but we begin by discussing the principle against suggestion.

A. Suggestion

Improper suggestion occurs when a question indicates the answer a lawyer desires from the witness, and the witness does not have any characteristics which would insure that he would affirmatively resist such suggestion if it was not scrupulously accurate according to all the details of his examined memory.²⁴

The first thing to note about this principle is that it does not entail any judgment about the witness having an affirmative reason to accept the suggestion. The vice of suggestion is much broader than the evil embodied in intentional deceit.²⁵ People willing to commit conscious per-

20. SIR H. HAWKINS (BARON BRAMPTON), 1 REMINISCENCES 30 (1904), quoted in 3 WIGMORE, note 2, *supra* at § 769.

21. DIGEST 48, 18.1, 21 cited in HOFFMAN, SOUTH AFRICAN LAW OF EVIDENCE 209 (1963).

22. SIR E. COKE, IV INSTITUTE OF THE LAWS OF ENGLAND 279 (1634).

23. Wigmore notes the problem of ratification but attempts to dispose of it in terms of pure suggestivity in a single sentence. 3 WIGMORE, note 3 *supra*, at § 772(2). The current edition of MCCORMICK takes the same approach but expands the rationalization to a paragraph. MCCORMICK, note 3 *supra* at 8-9. The only authority giving separate treatment to suggestion and ratification we have discovered is the opinion of Weintraub, C.J. in *State v. Abbott*, 36 N.J. 63, 174 A.2d 881 (1961).

24. The last part of the principle is our own addition. It is derived from the fact that it is not improper to suggest to a hostile or reluctant witness or one being cross-examined. See discussions in text at notes 30 & 47 *infra*.

25. This has long been recognized. Chitty observed in 1835: "[M]any witnesses either from complaisance or indolence, are too much disposed to assent to the proposition of the counsel and answer as he may suggest, instead of reflecting and answering after an exertion of their own memory." J. CHITTY, 3 PRACTICE OF LAW 892 (1835).

jury rarely need in-court coaching. Nor is the danger necessarily present because the witness identifies in any strong sense with the party who called her to the stand.²⁶ Rather, the principle against improper suggestion is a response to a number of more subtle human qualities.

First, most people are not paragons of cautious reflection in normal situations. Second, most witnesses are not accustomed to telling stories in public, and the experience is discomfiting. The unfamiliar surroundings of the courtroom can generate an anxiety which may erode normal levels of reflective caution. Third, witnesses are not likely to be affirmatively suspicious of the attorney calling them. Suggestions are more readily accepted since the suggested answer "sounds alright" and presents the line of least resistance.²⁷

Improper suggestion is an intractable problem. It may be infused into the question by the form of words selected. It may also be created through the use of vocal inflection, tone of voice, facial expression, gesture, etc.²⁸ Even if we limit our concern to the words which supply the desired hint, suggestiveness is a much more pervasive thing than people usually realize since it occurs at both the conscious and unconscious levels.

The means of conveying a suggestion seem inexhaustible. The language of the questioner cannot be controlled so that all levels of meaning inherent in words can be identified or restricted. Even the questioner cannot be aware of all the meanings his words convey, principally because the witness has an independent frame of reference to interpret the words. The questioner can only sense some of the secondary meanings he is conveying (although clearly some questioners are more aware of the multiple messages which they convey than others). The complex effect that the words used in a question can have on the answer was demonstrated in a recent experiment.

[S]ubjects viewed films of automobile accidents and they answered questions about events occurring in the films. The question, "about how fast were the cars going when they smashed into each other?" elicited higher

26. As Wigmore observed:

It will be seen that a collusive or conscious intention of the witness to answer as desired is here not a necessary assumption. That is a frequent danger but not the only one; for the known principles of human nature tell us that a witness may also unconsciously accept the suggestion of a question. It is therefore not necessary to attribute a corrupt intention either to witness or to counsel, since the danger has larger aspects than that.

3 WIGMORE, note 3 *supra*, at § 769.

27. It is clear that some question forms in English are inherently suggestive. See 3 WIGMORE, note 3 *supra*, at § 772(2). But even if word selection results in no suggestion, suggestion may be present from other factors, and the problems of improper ratification are unaffected, see note 23 *supra* and accompanying text.

28. This is a point generally recognized. See J. MAGUIRE, J. WEINSTEIN, J. CHADBURN & J. MANSFIELD, *CASES AND MATERIALS ON EVIDENCE* (6th ed. 1973) and authorities there cited; E. HEAFEY, note 3 *supra* at 62.

estimates of speed than questions which used the verbs, *collided*, *bumped*, *contacted*, or *hit* in place of *smashed*. On a retest one week later, those subjects who received the words *smashed*, were more likely to say "yes" to the question "did you see any broken glass?"; even though broken glass was not present in the film. These results are consistent with the view that the questions asked subsequent to an event can cause a reconstruction in one's memory of that event.²⁹

The problem of improper suggestion is even more subtle because each synonym of "smashed" has a statistically different suggestive impact on the answer to a given question.³⁰ Thus, the choice of a particular descriptive word may affect an observer's memory of the event. Even though "collided," "bumped," "hit," or "contacted" appear to indicate a speed less than the speed suggested by "smashed," these estimates may also be offensive to the truth. There is no evidence that there is a "right" word.

B. Ratification

Most explanations of improper leading have concentrated on the danger of suggestion.³¹ At the same time, some courts have traditionally frowned on inquiries answerable by yes or no and erected a sort of "leading as a matter of law" rule.³² This approach creates problems. As other writers have pointed out, questions answerable by *yes* or *no* need not be leading if "suggesting the desired answer" is the only criterion. Theoretically such inquiries leave a complete free choice in selecting the answer.³³ Most of the discussion in the "yes or no" debate seems to miss the essential point. A question is improperly leading not only if it is suggestive, but also (although it is perfectly neutral in context, form, etc.) if it contains factual detail which could and should originate from the witness. By

29. Loftus and Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory*, 13 J. VERBAL LEARNING AND VERBAL BEHAVIOR 585 (1974).

30. *Id.* at 589.

31. See note 38 *infra* and accompanying text.

32. This mechanical rule approach seems to have been most favored in the early nineteenth century. The most influential American treatise of the period took such a position. S. GREENLEAF, EVIDENCE 506 (2d ed. 1840). See *Nicholls v. Dowding*, 171 Eng. Rep. 408 (K.B. 1815); *U.S. v. Dickinson*, 2 McLean 331 (1840); *State v. Johnson*, 29 L. Ann. 717 (1877); *People v. Mather*, 4 Wend. 229 (N.Y. 1830). In an intuitive, though unexamined, rejection of the rule, some nineteenth century courts held yes-or-no questions always proper. *Adams v. Harrold*, 29 Ind. 200 (1867); *Pelamoures v. Clark*, 9 Iowa 1 (1859). The approach, however, was not uniform. For instance the court in *Bartlett v. Hoyt*, 33 N.H. 151 (1856) refused to hold such questions were always leading, observing the possibility of neutrality of form which would not suggest whether "yes" or "no" was desired. See also *Hopkinson v. State*, 12 Vt. 582 (1840). The leading English text seems to have been contra *per se* prohibition of a yes-or-no question, though the rule actually espoused and the examples given are virtually unfathomable. 1 S. PHILLIPS, EVIDENCE 269 (7th ed. English 1839).

33. See *Bartlett v. Hoyt*, 33 N.H. 151 (1856); 3 WIGMORE, note 3 *supra*, at § 772; MCCORMICK, *supra* note 2, at § 6 n.9.

adopting that detail and the form in which it is expressed, the witness is unlikely to be exercising examined reflection, and certainly is not herself selecting the words which she believes best express her reflection. The resulting danger of misinformation is as much a target of the principle prohibiting improperly leading questions as the risks created by undue suggestion.³⁴

The rationale supporting a principle against improper ratification is quite simple. Word selection, the context of the answer, and the demeanor of the examinee contribute to the message the witness is conveying. There are many truthful ways to describe certain events. The proponent of the witness wants the story presented in its most favorable light, and her attorney, with careful preparation, can do much to achieve this goal. Yet, the attorney could assure the same result if he were free to tell the story through the question (in words truthfully selected and perhaps even agreed upon by the witness, as reflecting the truth accurately) and merely give the witness a clear choice to accept or reject. It can only be assumed the witness might convey a different message if forced to put the story in her own words. The fact finder and the prospective cross-examiner have the right to consider the other meanings that might come from the answer to a non-leading question.

The extent of the ratification problem depends on the generality with which questions are framed. A preference should exist for questions on the highest plane of generality which still provide sufficient direction to advance the story.³⁵ The key consideration in determining improper ratification is: Would it be reasonable to require formulation of a more general, less detailed question?³⁶

Ninety-nine percent of all questions objectionable as improperly leading will contain too much detail.³⁷ Precisely predicting how much is

34. *State v. Abbott*, 36 N.J. 63, 74 A.2d 881 (1961). See note 48 *infra*. But this does not mean that all so-called "categorical" questions, that is questions answerable by "yes or no" inevitably contain objectionable amounts of detail.

35. This phraseology we believe better expresses the principal than the common attempt to dichotomize between "leading questions," and those which "only suggest the topic of inquiry to be explored." That dichotomy is not new, see *Bartlett v. Hoyt*, 33 N.H. 151 (1856) but it is common, see, e.g., 3 WIGMORE, note 3 *supra*, at § 769. Note once again that certain general "yes or no questions" may under the test given in the text be perfectly proper in many situations.

36. The facility with which a more general question might be framed was recognized at an early date as central to deciding whether a challenged question is improperly leading. *Bartlett v. Hoyt*, 33 N.H. 151 (1856).

37. At this point we could undertake a lengthy discussion of whether ratification is really a sub-category of suggestion or a separate phenomenon. Obviously, detail in a question may impart a suggestion that the questioner desires either ratification or rejection of the complete package. However, even if the two things are inevitably related, we think it is extremely important to approach them as separate. Suggestion is pervasive, but its objectionable forms, ratification aside, are both easier to recognize and to avoid instinctively. Ratification problems are harder to avoid, instinctively, but more manageable analytically.

too much is impossible. Each judge has a different "tipping point" depending on her perception of the context in which the question is asked and the feasibility of less detailed questions designed to elicit the desired information.

When an objection based on too much detail is sustained, what should the attorney do? Rephrasing the question to a more neutral form without eliminating some of the detail won't cure a ratification problem.³⁸ Therefore a lawyer may do the following: (1) To cure a leading question, an attorney should move to a level of generality broader than the question found offensive; (2) To avoid leading, an attorney should ask questions incorporating as few specific details for ratification as possible; (3) To lead as much as possible without leading improperly, the attorney must be familiar with the judge's instincts. From a judge's perspective, whether or not a question is improperly leading often depends on the ease of framing another more general question reasonably expected to elicit the same information.³⁹

One can *learn* to handle ratification more easily when it is viewed as separate from suggestion.

38. It is amazing how much talismanic question forms such as "State whether or not" are relied upon by attorneys to attempt to make the vice of leading disappear, and more amazing how often they work when they probably should not. Consider the following "hint" from an experienced trial practitioner:

If your questions incorporate some of the information stated by the witness in a succinct fashion, the chances are that they will not be subject to the objection that they are leading. However, if you are having a problem with that sort of objection, remember the words "if any". These words tend to open doors. For instance, if your adversary constantly objects to a question such as "How many feet were you from the defendant's car when you first saw it?" you will erase much of the objectionable nature of the question by inserting these two little friends. For some reason your adversary and judge will be much more sympathetic to the question "How many feet, if any, were you from the defendant's car when you first saw it?" Try it and see.

P. AUERBACK, TRY IT: A TRIAL TECHNIQUES MONOGRAPH 68 (1976) (Institute for Continuing Legal Education).

39. See note 36 *supra*. Consider the following contrasting situations:

A defendant in a criminal case is charged with murder. Defendant takes the stand and is asked: "At any time, did you intentionally strike anybody with this ax?" Though very specific, it is difficult to see how counsel could be more general and still elicit an answer concerning defendant's state of mind relative to intentionality. "How did you strike the victim?" won't work; neither will "in what frame of mind were you?" Although the well prepared witness might answer either question that he had acted "unintentionally", this result cannot be assumed, and defendant should not have to pay the cost of its apparent artificiality. See *State v. Abbott*, 36 N.J. 63, 174 A.2d 881 (1961).

But suppose in a civil case, a plaintiff is asked by her own counsel "were you in pain at that time?" Here, as in the above example, we have a relevant subjective state. But the more general question "how did you feel?" is perfectly natural, servicable and available. Therefore, "were you in pain?" is improperly leading. Cf. *People v. Cross*, 40 Ill. 2d 85, 237 N.E.2d 437 (1968).

C. Leading Questions on Cross Examination, Redirect Examination and Interrogation by the Judge

Traditionally, the dangers embodied in the prohibition against leading questions are thought to be present only on direct examination. Consequently, the objection is usually not available against a cross-examiner,⁴⁰ or when a judge undertakes examination.⁴¹ The objection, however, is in theory available on redirect.⁴² But the assumption upon which these generalizations are built is deficient. The usual rationale is that the witness identifies with the party calling him. This assumption has already been criticized when we considered the danger of improper suggestion.⁴³ There is a kernel of wisdom, however, in drawing an analogous distinction between initial examination on a topic and all subsequent examination.

Leading questions are most harmful the first time a story is told.⁴⁴ Once a witness presents testimony in the solemnity of the courtroom, certain forces seem to come into play. Courtroom ceremony is serious and no witness will lightly change his story once it is told. Suggestions planted initially will be hard to remove, and other mistakes will not be easily corrected. Accordingly, the first questioner starts with a witness having a more pliable state of mind while the second examiner is faced by a more rigid mentality.

Furthermore, the story elicited by direct examination is usually harmful to the interests of the second examiner's client. There is great resistance to recant once someone solemnly gives damaging testimony in the presence of the person affected by the statement. Because the cross-examiner encounters resistance from the witness she needs a tool to combat that attitude.

This analysis suggests that the first time an area of information is

40. Few would challenge this statement. For an example of such a flat declaration see M. LADD & R. CARLSON, *CASES AND MATERIALS ON EVIDENCE* 25 (1972). Still, insofar as it is an overstatement, we must admit that both Wigmore and McCormick recognized the qualification on the rule which few practicing lawyers seem to be aware of. See note 47 *infra* and accompanying text.

41. Wigmore was a great proponent of virtually unfettered judicial interrogation, see, 3 WIGMORE, note 3 *supra*, at § 784. McCormick notes that in jurisdictions where the court has no power to comment on the evidence, some leading questions would be taken as improper comment in a jury case but finds no restriction on leading *per se*. MCCORMICK, note 3 *supra*, at 12-13. One mild authority exists to the contrary. See *Commonwealth v. Berkowitz*, 133 Pa. Super. Ct. 190, 2 A.2d 516 (1938). Cf. *Paydo v. Union Collieries Co.*, 146 Pa. Super. Ct. 385, 22 A.2d 758 (1941).

42. *People v. Terczak*, 97 Ill. App. 2d 373, 238 N.E.2d 626 (1968).

43. See note 26 *supra* and accompanying text.

44. And thus may produce the most harmful effects (in our system) far in advance of trial when witnesses are initially interviewed. The implications of this practice are beyond our present scope, but see generally Domaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975).

developed, general questions should be used, unless some special circumstances indicate the witness would be especially resistant to suggestion or unthinking ratification. Even on cross-examination this restriction should apply. This is one important, if unstated, reason for the common limitation of cross-examination to the scope of direct.⁴⁵ When examination delves into an area of information not developed on direct there is no "cross" questioning, because there are no original questions to "cross."⁴⁶

Sometimes an attorney may call a witness to discharge a burden of introducing evidence, even though the witness is biased in favor of the opponent, or *is* the opponent. In such a case, cross-examination properly within the scope of the direct may be subject to all the dangers of leading on direct, even though the examination is topographically cross-examination. Here the judge can and should restrict the cross-questions to the level of generality usually only required of direct examination.⁴⁷

If the principle that a witness should not be led improperly sometimes requires restrictions on the questions of one formally in the role of cross-examiner, it should much more forcefully restrict the judge if he undertakes witness examination. Although a person may be able to resist cross-examination to a limited extent, few witnesses are the psychological adversary of the judge in any way that would lead them to resist suggestion or ratification.

Traditionally judges' questions have been found to be immune from the prohibition against leading, ostensibly because the judge did not call the witness and because the judge is impartial.⁴⁸ But not having called

45. *See* FED. R. EVID. 611(b). Wigmore dismissed this argument as "founded on a fallacy." 3 WIGMORE, note 3 *supra*, at § 1887(d). However, Wigmore here more clearly than in his writings on leading questions *per se* adopts the "compurgator" rationale for the restriction on leading on direct examination. It seems to us therefore that it is Wigmore's arguments which are "founded on a fallacy."

46. This approach to the essential meaning of the term "cross" in cross-examination seems supported by the OXFORD ENGLISH DICTIONARY entry on the term.

47. Wigmore and McCormick both recognize the principle, *see* cases collected at 3 WIGMORE, note 3 *supra*, at § 973 n.2. and MCCORMICK, note 3 *supra*, at 10 n.13. *See also* the related phenomenon of reluctant witnesses on direct, note 48 *et seq. infra*.

48. Ellenborough, L.C.J. in answering criticisms on the procedure of a Commission inquiring into the charges against the Princess of Wales states:

Folly, my lords, has said that in examining the witnesses we put leading questions. The accusation is ridiculous; it is almost too absurd to deserve notice. In the first place, admitting the fact, can it be objected to a judge that he put leading questions? Can it be objected to persons in the situation of the Commissioners that they put leading questions? I have always understood, after some experience, that the meaning of a leading question was this, and this only: That the judge restrains an advocate who produces a witness on the particular side of a question, and who may be supposed to have a leaning to that side of the question, from putting such interrogatories as may operate as an instruction to that witness how he is to reply to favor the party for whom is adduced But to say that the judge on the bench may not put what questions and in what form he pleases can only originate in that dullness and stupidity which is the curse of the age.

the witness does not prevent the witness from "cooperating," and impartiality does not mean the judge's questions cannot contain suggestions, witting or unwitting, of detail which should better come from the witness. Thus the dangers presented by suggestion or ratification exist even if a judge is involved. Most authorities fail to recognize that improper leading by a judge can be as distorting as such actions by an attorney and should be avoided.⁴⁹

It is hard to advise a lawyer how to deal with the tactical considerations which arise when a judge asks improper leading questions. It is clear, however, that the rationale for granting *carte blanche* is either inaccurate in that it addresses itself only to the judge's different relationship with the witnesses, or irrelevant in that it is concerned with the question of judicial discretion and harmless error, and not the judge's duty of self-control under the applicable principle. Yet, if she undertakes examination, a judge is duty bound to minimize problems brought about by improper suggestion and ratification, at least where the information is being developed for the first time on the record.

For the sake of completeness, we must observe that redirect examination involves less possibility of improper leading since such questioning is limited by the scope of earlier interrogation. The narrow focus required during redirect, however, makes increased specificity of questions almost unavoidable. While the principle against improper leading still has application on redirect, there is good reason to allow a degree of detail which would have been objectionable on direct.

"EXCEPTIONS" TO THE LEADING QUESTION "RULE"

Since we have already said there is no leading question *rule* no "exceptions" can logically exist. A number of reasonably well defined situations exist, often called exceptions, when the dangers of suggestion and ratification are thought to be very low, or else so far outweighed by considerations of convenience, necessity, or efficiency that virtually no question will be found to be objectionable as improperly leading. The usual

25 Hansard, Parl. Deb. 207 (1813). See also *State v. Mano*, 29 N.J. Super. 411, 102 A.2d 650 (1954). However, Wigmore may not have been in favor of unlimited judicial leading, for he concludes his discussion of the subject thus: "It follows that a judge's questions may be leading in form, simply because the reason for the prohibition of leading questions has no application to the relationship between the judge and the witness." 3 WIGMORE, note 3 *supra*, at § 784(2).

Wigmore may be implying some restriction when he says judge's questions may be leading "in form;" presumably he means leading in substance remains forbidden, whatever that might mean.

49. Not all authorities. See Saltzberg, note 4 *supra*, and cf. *People v. Mees and Valenzuela*, 47 N.Y.2d 997, 394 N.E.2d 283, 420 N.Y.S.2d 214 (1979) (judge's asking of more than 1300 questions during manslaughter trial denied the defendants a fair trial).

list includes cross-examination, questioning by the judge, hostile or reluctant witnesses, establishment of the non-happening of an event, omitted detail, refreshing a witness' memory, contradiction of previous testimony and other "rebuttal," establishment of preliminary and undisputed matters, transitions, and assistance of handicapped witnesses. These "exceptions" help define and shape the boundaries of the general principle against improper leading. Cross-examination and interrogation by the judge have already been discussed. The other topics on the list are dealt with below.

A. The Hostile or Reluctant Witness

Sometimes the relationship of the direct examiner and the witness is topsy-turvy. Usually we assume the direct examiner has at least a cordial relation with witnesses she calls; that she has been able to prepare them; that they will candidly give information in response to general questions; and that no particular circumstance will create any special internal resistance to the distorting effects of suggestion or ratification.

Occasionally the necessity of discharging the burden of production makes it necessary to call witnesses about whom these assumptions cannot be made.⁵⁰ One clear example is an opposing party who hates both the lawyer and the party on whose behalf he is called. The phenomena of grudging frankness and resistance to both suggestion and ratification, however, are not limited to people who are opposing parties. It can also be found, for example, in a non-party witness who is a friend of an opposing party or resents having been subpoenaed.

There are really two factors the law might look to in determining whether questions which normally would be offensively leading are proper ones: (1) The presence of circumstances indicating unusual resistance to suggestion or ratification without reflection and (2) A demonstrated lack of frankness or grudging response to general questions. The first possibility removes the danger of leading, and the second establishes a necessity to lead.

The usual common law position concerning a hostile or reluctant witness seems to rely on the second factor. Such witnesses may be examined "as on cross" but no particular group of persons is necessarily presumed hostile or reluctant. Only by demonstrating a failure to be forthcoming in response to normal direct can a witness be declared "reluctant," although a witness' personal interests might make believable a claim that answers are less than forthright.⁵¹

50. See *Johnson v. B & O Railroad*, 208 F.2d 633 (3rd Cir. 1953).

51. The following quotation from *W. EVANS* is illustrative:

This unwillingness is commonly to be decided by the judge, according to his

While modern codes of evidence do not abolish the possibility of a witness being declared "reluctant" after questioning,⁵² situations involving a high likelihood of resistance are emphasized, especially in relation to parties.⁵³ Since opposing parties will affirmatively resist suggestion and ratification without reflection, questions which lead extensively are allowable, even though more general inquiries might have elicited frank and forthright answers. Thus, most such codes allow parties to an action to be examined "as on cross" from the beginning without requiring a finding of reluctance or hostility.⁵⁴

B. Non-Happening of an Event or Rebuttal

Here we deal with two loosely related circumstances justifying more particularity on direct examination than is usually permissible. The first case is the establishment of the non-happening of an event. When the questioner seeks to establish what did happen, the question "what happened?" or some slightly more specific variant is usually servicable. When trying to show what did not occur the drawbacks of the question "what didn't happen?" are obvious,⁵⁵ and a particularized question is not only allowable but necessary.

Somewhat related is the occasion of the rebuttal witness called to refute particular details of another person's story. While this situation may involve establishing the non-happening of something, it may also

impression of the demeanour of the witness, upon the trial. The situation of the witness, and the inducements which he may have for withholding a fair account, are also very proper circumstances to be taken into account in forming this decision. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness; a servant will not, in an action against his master, be very ready to acknowledge his negligence committed by himself.

W. EVANS, 2 NOTES TO POTHIER 228 (1806) quoted by Wigmore at 3 WIGMORE, note 3 *supra*, at § 772.

52. Though Federal Rule of Evidence 611(c) (hereinafter F.R.E.) relies inexplicably on the word "hostile," the term "reluctant" is much better than "hostile." Animosity may be a factor but the constant reference to "hostile witnesses" has confused people into thinking it is the only factor. This has never been the case, and the term "hostile" seems not to have been prevalent before the latter part of the 19th century. For instance *Stratford v. Sanford*, 9 Conn. 275 (1832) refers to a "leaning" witness.

53. There is some indication that an almost mechanical practice, independent of an official rule, allowing any adverse party called to be examined by leading questions, had evolved in some jurisdictions by the late 19th century. See the dictum of C. Appleton, to that effect in *State v. Bronner*, 64 Me. 267, 4 A. 701 (1874).

54. Federal Rule of Civil Procedure 43 (hereinafter F.R.C.P.) as originally promulgated in 1938, contained a clause allowing interrogation of an "adverse party, or an officer, director, or managing agent of a public or private corporation, or of a partnership or association, which is an adverse party" by leading questions. F.R.E. 611(c) expanded this to include "an adverse party or a witness identified with an adverse party." What is meant by the last phrase is unclear.

55. Consider the interrogation of Cadet Clevinger by the bloated Colonel in J. HELLER, "CATCH 22" 79 (Dell Paperback ed. 1962):

require the establishment of the occurrence of something inconsistent with the first story.⁵⁶ Even on initial direct, fairly particularized questions may be justified by considerations of efficiency. In this regard rebuttal is somewhat like redirect,⁵⁷ with the *caveat* that the questioner of a rebuttal witness is still dealing with that witness' initial rendition of the events. Some courts go too far in this area and allow questions raising ratification problems, especially when dealing with the establishment of prior inconsistent statements for purposes of impeachment. Attempts to rationalize this overgenerous attitude are less than persuasive.⁵⁸ The examiner must attempt to heed the fine line between the general kind of details the witness should address (which may be justified by expediency) and a question that goes too far. The court must enforce such a distinction on the basis of the particular circumstances involved, not by a flat rule allowing all leading in such a situation.

"I didn't say you couldn't punish me sir."

"When?" asked the colonel.

"When, what sir?"

"Now, you're asking me questions again?"

"I'm sorry sir, I'm afraid I don't understand the question."

"When didn't you say we couldn't punish you? Don't you understand the question?"

"No sir, I don't understand."

"You've just told us that. Now suppose you answer my question."

"But, how can I answer it?"

"That's another question you're asking me."

"I'm sorry sir, but I don't know how to answer it. I never said you couldn't punish me."

"Now you're telling us when you did say it. I'm asking you to tell us when you didn't say it."

Clevenger took a deep breath. "I always didn't say you couldn't punish me sir."

"That's much better Mr. Clevenger, even though it is a barefaced lie."

56. An example might be as follows: Witness A has testified that person B never gave him a warning. Person B is then called. The question "what did you tell A?" may not elicit (in any natural way) information concerning the warning. "Did you say anything to alert him to the danger?" might be permissible. "Did you tell A not to cross the bridge on June 15 at 4:00 p.m.?" would probably go too far in the direction of unnecessary ratification.

57. See text following note 49 *supra*.

58. See 3 WIGMORE, note 3 *supra*, at § 779. Wigmore's argument is that since most jurisdictions follow the requirement of foundational specificity of questioning before allowing proof of a prior inconsistent statement, (see note 103 *infra* and accompanying text) and since a statement forthcoming from the impeaching witness which varies substantially from the one on which the witness being impeached was questioned would not be admissible as outside the scope of the foundation laid, leading is justified. This reasoning is subject to two criticisms. First, it seems to be more appropriately an attack on the requirement of laying a technical and picky specific foundation, to which Wigmore was opposed. See 3 WIGMORE, note 3 *supra*, at § 1029. Second, if the foundation requirement is accepted as proper, avoiding problems by leading is unprincipled when the witness' own memory would not have so done. The "exception" for establishing prior inconsistent statements was old when Wigmore wrote. See S. PHILLIPS, LAW OF EVIDENCE 271-721 (7th Amer. ed. 1839). See also the criticisms in *Swoboda v. Union Pac. R. Co.*, 87 Nev. 200, 127 N.W. 215 (1910) and *Norton v. Parsons*, 67 Vt. 526, 32 A. 481 (1895).

C. Supplying Omitted Detail

Often, on initial direct, a general question elicits a version of events which leaves out some important fact. More specific questions than would have been initially permissible may be necessary to reveal the omitted detail. In this case the direct examiner has paid a price for the allowance of a particularized question.⁵⁹ The jury and the opponent hear the initial version of the story and are aware the details come from particularized questioning.

The phenomenon of omitted detail is an example of what might be termed "impaired memory" and the leading questions thus permitted could be called examples of "refreshing recollection."⁶⁰ But we do not think this is the most helpful way of viewing it. In the case of most omitted detail, the witness does not forget the detail, but instead forgets to say it. Particularized questioning may sometimes be necessary, but, as in the case of rebuttal,⁶¹ inquiries stopping short of "yes or no" ratification may be serviceable and therefore preferable. In the event of true lapse of memory, refreshment must often supply the most specific of details to be effective.

D. Refreshing Recollection

Refreshing present recollection entails an overt act of suggestion.⁶² If done properly interrogation reveals a clear failure of the witness' memory and a need for help. Many situations calling for refreshing recollection occur. A witness may panic or freeze. A witness can require assistance because her testimony is voluminous and not easily remembered. The device of refreshing permits anything to be used as a memory jog, including "a song, or a face, or a newspaper."⁶³ Generally, therefore, any document, regardless of its authenticity or mode of preparation, may be used as a refresher.⁶⁴ Anything can be used to refresh recollection since the witness, still under oath, must then swear that the resulting testimony is from her actual present memory even though the recollection is revived by whatever aid the lawyer provided. The rationality of the jog is irrelevant as long as it results in the witness swearing the resulting testimony is from present memory. Of course, the witness might be lying, but from the point of the oath onward, that is a decision for the jury.

59. See text at note 66 *infra*.

60. To the extent this phenomenon has been recognized at all, this seems to be the way it has been treated. See MCCORMICK, note 3 *supra*, at 10.

61. See text at note 56 *et seq. supra*.

62. See generally 3 WIGMORE, note 3 *supra*, at §§ 758-63, MCCORMICK, note 3 *supra*, at 14-19.

63. *Jewett v. U.S.*, 15 F.2d 955, 956 (9th Cir. 1926)

64. 3 WIGMORE, note 3 *supra*, at §§ 759-61 and cases there collected.

If anything may be used to refresh recollection, then arguably a leading question may be used. The problem, however, with using leading questions to refresh is that such use accomplishes exactly what the prohibition against leading questions was designed to avoid.

When using devices other than leading questions to refresh a person's memory the attorney pays a real price. Before the song, face, or newspaper is shown, the witness must first usually indicate the need for such assistance by demonstrating an impaired memory.⁶⁵ Second, when the potential stimulus is presented to her there is a significant break in the flow of the testimony. Throughout this procedure the need for suggestion is realized by the witness, the opposing counsel, and the trier of fact. Finally the stimulus chosen, although not in evidence, will be available for use on cross-examination.⁶⁶

If leading questions are routinely permitted as refreshers, however, there is a danger that most of the protective ritual will be lost. A leading question may make it too easy to avoid a showing of impaired memory and allow the lawyer to refresh by suggestion without paying the price exacted by a formal procedure. To make matters worse, even if the witness' memory is not refreshed by the inquiry the jury has been exposed to the contents of the question.

We admit that situations arise where efficiency obviously justifies using a leading question as a refresher, rather than taking the time to prepare and utilize a written refresher. Because of potential abuses, however, use of leading questions to refresh should only be permitted with the express consent of the trial judge, and his decision should take into account the potential problems with the device.

E. Correcting Inaccurate Detail

One unfortunate but common situation occurs when the witness gets an element of his story wrong, or at any rate makes a statement inconsistent with what he has previously told the examining attorney. This problem may result from an inadvertent misstatement, or a lapse of memory, but whatever caused it cannot be ascertained unless an inquiry is made. What may counsel do, and what limitations should be imposed on her in this difficult situation?

65. There is a line of cases, based upon poor or absent analysis, which allows a proponent faced with a turncoat witness who has made a previous statement, and now makes a contrary statement from the witness stand, to confront the witness with the statement for the purpose of "refreshing recollection" even if the witness affirmatively claims good current recollection. Whatever policies are or may be served by allowing such a practice, it has nothing to do with refreshing impaired memory. See the cases collected at McCORMICK, note 3 *supra*, at 10 n.18.

66. 3 WIGMORE, note 3 *supra*, at §§ 762-63.

A party should not lose because of an inadvertent misstatement, but testimony should not be tailored or cured too cheaply. The only reasonable response to this situation is to require the judge's permission before inquiring into the sudden change of story. The judge should not allow inquiry unless counsel clearly asserts the surprising nature of the testimony and the importance of correcting or clarifying the testimony.

F. Preliminary Matters, Authentication, Undisputed Matters, and Transitions

This is a cluster of "exceptions" to the "leading question rule"⁶⁷ which is thought to share the same cost-benefit considerations: The dangers of undue suggestion or ratification are slight, and are not thought to justify the time it would take to consider how general the questions should be.

Preliminary matters are those such as the witness' name, address, occupation, etc. which give the small amount of generally allowed witness background without going into the relevant details of the witness' story. Authentication of exhibits (sometimes referred to as identification) involves a witness giving the required foundational information concerning a proposed exhibit that in some sense will establish the relevancy of the exhibit to the case. In some cases of authentication, the justification for allowing very specific questions is not limited to the slight dangers which might flow from leading; but also includes the fact that the witness may need guidance in identifying the specific type of information required by the law before an exhibit can be allowed into evidence.

Rarely do lawyers use leading questions with their own witness in establishing preliminary matters. A lawyer does not usually ask his own witness "your name is Sam Smith, isn't it?" or even "are you Sam Smith?"; and the question "what is your name?" would not need special consideration to conclude that it was not too suggestive or specific.

In the case of authentication use of leading questions is more common and this use presents a greater likelihood of questions which contain

67. "Preliminary matters," "undisputed matters" and "transitions" are listed separately in LOUISELL, KAPLAN & WALTZ, *supra* note 3, at 11. The authors assert undisputed matters may be the subject of a leading question only when "the question is used as a connective." McCormick makes no such qualification, speaking of allowing leading questions to any matter "substantially undisputed." MCCORMICK, note 3 *supra*, at 10. See also C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 11 (1st ed. 1954). McCormick does mention "preliminary matters," but does not mention "transitions" specifically, noting only that a question "may be employed to suggest a subject or topic as distinguished from an answer." *Id.* at 10. Wigmore speaks of "Preliminary undisputed matters" as a single category. 3 WIGMORE, note 3 *supra*, at § 775. The category "authentication" or "identification of exhibits" seems to be a California product. See E. HEAFY, note 3 *supra*, at § 13.11 and cases there cited.

improper suggestion and ratification. Occasionally a lawyer may ask such things as "is this the gun you found at the scene?" instead of "what is this?" If this question follows a more general question which has failed to get the required detail, it would merely be an example of supplying originally omitted detail. But if an attorney opens with the same inquiry, it may be of questionable propriety, despite the traditional "exceptions," if a more general question would suffice. No policy would justify putting the question in a suggestive form such as, "this is the gun you found at the scene, isn't it?" This example illustrates that a "rule" allowing *carte blanche* as to foundational matters is unwise. The problem is similar to that discussed in relation to the eliciting of missing detail.⁶⁸ Complete specificity in a question is usually avoidable and therefore should be avoided. Finally, there appears to be no justification for the allowance of suggestive form even where great specificity of detail is allowable.

Similar observations may be made concerning "undisputed matters," except that the concept of what constitutes an undisputed matter is itself a little slippery. If a detail is formally undisputed, evidence of it is not needed—the jury may simply be instructed to treat the issue as established. The opponent will usually not object to the admission of undisputed material, and no special principle allowing particularized questioning is required. If the details are even slightly disputed they are not "undisputed."⁶⁹ We suppose there are situations where it is clear from the courtroom scene that a certain matter is not being disputed in good faith, and that objections are being made only for tactical reasons, i.e. to confuse the situation or break the opposing counsel's pace or confidence. When a judge declares a matter is undisputed, however, be it for the purpose of leading or for other purposes, questions about invading jury trial rights are raised.⁷⁰ Such action should be taken only in the clearest cases and with utmost caution.

Questions involving a transition between different topics create a problem distinguishable from the dangers engendered in a leading examination. Transition statements rarely contain too much detail for ratification or suggest a desired answer. If statements "only call attention to a topic and not an answer" they are not improperly leading, even by tradi-

68. See text at note 59 *supra et seq.*

69. This is probably why McCormick refers to "substantially" undisputed. MCCORMICK, note 3 *supra*, at 10.

70. Similar problems may arise in many contexts since the language which originated in the Model Code of Evidence, found its way into the first version of the Uniform Rules of Evidence and has since been adopted in some jurisdictions. "In civil proceedings, if the judge finds at the hearing that there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, except for a valid claim of privilege." See e.g. N.J. Rule of Evidence 3.

tional analysis.⁷¹ Advocates, however, are interested in more than the economics of time when making transition statements about changing topics to the witness and triers of fact:

A series of questions and answers covering a number of topics has a way of merging into an amorphous unstructured mass. The lawyer most often proceeds from one facet of the case to another with no indication to the witness, the judge or the jury that such shifts are going to take place. One would not expect to ingest a novel in one gulp. The author conveniently creates bite sized chapters for easier digestion. Any written offering has topic sentences, paragraphs, titles to aid in the understanding of the subject matter. Certainly if the technique is valid for written information which can be studied and (digested) at leisure then it seems reasonable that the same technique would be beneficial in presenting verbal information.⁷²

The use of such "topic headings" in oral transition is obviously appealing, but there is a potential for abuse. The abuse is not, however, the abuse of leading. Since these transitions are aimed primarily toward the trier of fact, they threaten to become improper forensic argument presented during the process of evidence production instead of at the time reserved for such argument. This topic will be considered later.⁷³

G. Assisting Handicapped Witnesses

Courts frequently, but not invariably, permit leading questions if the witness is somehow handicapped.⁷⁴ Whenever the age, education, or physical or mental condition of the witness requires that she be assisted, it is appropriate to consider the allowance of otherwise unduly leading questions.⁷⁵ In any of these situations, however, there is a paradox. As the need for assistance increases the justification for leading questions increases. Yet, cross-examination is less able to expose suggestion or unconsidered ratification of detail as the infirmities which make leading necessary increase.⁷⁶

Occasionally, cases arise which throw the issues involved in this dis-

71. See note 36 *supra* and accompanying text.

72. J. JEANS, TRIAL ADVOCACY § 9.13, p.222 (1975).

73. See text at note 137 *et seq. infra*.

74. See 3 WIGMORE note 3 *supra*, at § 778.

75. Comprehension infirmities must be carefully distinguished from narration infirmities. Wigmore considered the primary issue as one where the witness needed to be led in order that the witness would understand the question. See 3 WIGMORE, note 3 *supra*, at § 778 nn.1, 2, & 3. He considered less important the situation, perhaps less common, of the witness who would understand general questions but would not be able to respond to them accurately. *Id.* at § 778 n.4.

76. The problem of exposing unthinking ratification, and therefore the paradox, is especially bad with children and other witnesses of limited comprehension, as well as limited communicative ability. McCormick recognized the problem but asserted that "it is better to face the danger than abandon altogether the effort to bring out what the witness knows." MCCORMICK, note 3 *supra*, at 10.

cussion into stark relief. A key witness exists who for a variety of physical reasons can only communicate by responding in such a way as to indicate "yes" or "no" to questions put to her.⁷⁷ To refuse to allow leading is to lose the benefit of her information. This course may seem even less acceptable if the incapacitated person is the only witness. Yet, the allowance of very particular questions may result in both improper ratification and suggestion which are difficult to discover on cross-examination because all that has come out on direct is the examiner's carefully tailored statement. The cross-examiner starts with little, and, though he may still ask very pointed leading questions, he is unlikely to get very far in exposing seams in the ratified story. This problem in probing occurs because of the inability of the witness to volunteer information, and because pressing the witness too vigorously is likely to look like kicking a cripple. (This problem only partly relates to the dangers of leading. It also raises the issue of whether there should be a level of ability to communicate beyond a mere "yes" or "no" required of a witness in order to insure effective cross-examination.)⁷⁸

One last issue should be mentioned here. Some cases claim that leading is allowed in "delicate" situations.⁷⁹ These decisions deal with cases involving sexual activity as an issue where witnesses, usually female, are allowed to be led because they would be embarrassed to describe the details themselves. Wigmore apparently considers this to be a subcategory of the impaired witness doctrine,⁸⁰ and so it is, if leading questions are allowed only after the witness shows testimonial impairment because of embarrassment. Some courts, however, seem to allow leading *ab initio* in this situation. Such a practice has little to recommend it. The witness may not need to be led, and if she requires leading, the proponent should pay the price of exposing this weakness before resorting to leading.

H. Conclusion

Finally, no discussion of traditional "exceptions" to the leading question "rule" would be complete without noting that "the discretion of the

77. Compare *Belknap v. Stewart*, 38 Neb. 304, 56 N.W. 881 (1893) (Divorce case. Witness had no apparent comprehension problems, questions allowed) with *People v. White*, 40 Ill.2d 137, 238 N.E.2d 389 (1968) (Larceny prosecution. People's witness had both comprehension and communication problems. Allowance of testimony held error).

78. The problem is not a new one. Consider this excerpt from *State v. Mairs*, 1 N.J.L. 518, 520 (1795):

These are leading questions and therefore improper. I know a man acquitted of a foul murder because the principal witness for the prosecution . . . could only answer "yes" or "no" and the court would not permit the facts upon which the evidence was wanted to be put to him in the interrogatory.

79. See 98 C.J.S. *Witnesses* § 331(d) (1957) and cases there collected.

80. See 3 WIGMORE, note 3 *supra*, at § 778 n.2.

trial judge" is often said to comprise such an exception.⁸¹ Obviously, we do not believe that reference to "discretion" as an "exception" is a proper view. The principle against improper leading binds the judge to attempt to keep the questioning process free from undue suggestion or ratification. The "exceptions" indicate recurring circumstances where more specificity than usual is allowable. It is true that other circumstances may arise which require a greater degree of particularity, but which do not fit a recognized "exception." In these cases the judge can and should allow "leading."⁸² This possibility, however, should not obscure the fact that the judge's "discretion" is constrained by principles which the parties have a right to appeal to, and to have conscientiously applied.

SANCTIONS FOR ABUSE OF THE QUESTIONING PROCESS BY IMPROPER LEADING

The problem of control raises the issue of sanction, which in turn separates into two cognate problems: (1) What should or can a judge do if a question is improperly leading? (2) What recourse does a party have if a judge allows questions which violate the principle prohibiting improper leading?

The latter question is answered quickly in that a party has virtually no recourse. We find no reported case in the last fifty years in which a reversal resulted solely from failure to control leading in the questioning process, and only one in which it was a major factor in a decision to reverse.⁸³

The philosophy behind the appellate attitude is summarized by Wigmore:

It follows, from the broad and flexible character of the controlling principle, that its application must rest largely, if not entirely, in the hands of the *trial court*. So much depends on the circumstances of each case, the demeanor of each witness, that it would be unwise if not impossible, to attempt in an appellate tribunal to consider each instance adequately. Furthermore, the harm in a single instance is inconsiderable and more or less speculative, and the counsel's repetition of an impropriety can be so easily controlled by the trial court that no favor is shown in the appellate

81. It was thus listed as a separate objection by Wigmore. 3 WIGMORE, note 3 *supra*, at § 776(3).

82. We have omitted mention of the questioning of expert witnesses, also said by some authorities to allow "leading." The problems of interrogating expert witnesses are *sui generis* and are not dealt with in this article.

83. *Straub v. Reading Co.*, 220 F.2d 177 (3rd Cir. 1955). We have found one other 20th century case *Fountz v. Harker*, 200 Ky 233, 254 S.W. 744 (1923). *See also* *Turney v. Mississippi*, 9 Miss. (8 S.&M.) 104 (1847); *Steer v. Little*, 44 N.H. 613 (1863). A number of cases have listed abuse of leading questions as a partial consideration or alternative ground in reversals. *See e.g.*, *Nurnberger v. U.S.*, 156 F. 721 (8th Cir. 1907); *Henry v. Sioux City R.R. Co.*, 55 Iowa 52, 23 N.W. 260 (1855); *State v. Hazlett*, 14 N.D. 490, 105 N.W. 617 (1905).

tribunal's objections based merely on the form of the question.⁸⁴

There are some questionable assumptions behind this statement, the chief one being that the trial judge can easily control lawyers during the questioning process. There is little evidence that lawyers who put their mind to abuse can be controlled, and none that the trial judge can do it easily.

This raises an initial question: What can a trial judge do if he determines a question to be improperly leading. What follows is a laundry list of possible sanctions a judge could impose:

1. Strike the improper question and permit a proper question seeking the same information.
2. Admonish counsel at sidebar.
3. Admonish counsel in front of the jury, and perhaps in explaining why the question was stricken the judge could caution the jury against the distortions inherent in ratification and suggestion.
4. Strike the improper questions and refuse to allow the question to be rephrased, or to allow the witness to volunteer the information already improperly suggested.⁸⁵
5. Threaten to discipline the offending lawyer, either by way of contempt citation or complaint to the local disciplinary board.
6. Threaten a mistrial.
7. Declare a mistrial.
8. Use of a combination of several of the above alternatives.⁸⁶

Sanction #1 is apparently the simplest, most often used tool of control. It is, however, a very modest sanction indeed. The momentary embarrassment of being on the receiving end of a sustained objection may often be seen as being far outweighed by the benefits of improper leading in a particular situation. We believe it is a violation of a lawyer's ethical responsibility to yield to this temptation. But the sin is usually minor and seems to be almost invited by the *de minimis* nature of the sanction imposed.

At this point we must begin to distinguish between intentional and unintentional improper questions. One reason control of the questioning process is difficult is the realization that it is hard to avoid questions which go too far. Even an attorney who understands the principles restricting the way a question is framed on direct and has had practice applying those concepts can experience trouble. The problem of

84. 3 WIGMORE, note 3 *supra*, at § 770.

85. Wigmore suggests the power to do this and cites one case, *Burks v. State*, 120 Ala. 286, 24 So. 931 (1898), in support. 3 WIGMORE, note 3 *supra*, at § 770. McCormick calls the authority to do so "undoubted" though only Wigmore is cited. *McCormick*, note 3 *supra*, at 9 n.11. Other exercises of the undoubted power are difficult to discover. However, the sanction seems to be the proper one for an important violation. See text following note 91 *infra*.

86. These of course do not exhaust all imaginable responses. A judge might conceivably disqualify a witness from giving any testimony after an at all too bold an attempt at leading. Cf. *McPhail v. Johnson*, 11 N.C. 298, 20 S.E. 373 (1894).

unintentional offense is compounded by the fact that a bright line between proper and improper leading simply does not exist. As previously noted, perfectly conscientious judges may have different tipping points, and no attorney can predict the judge's response every time. The problem of unintentional offense is further aggravated by the fact that many lawyers imperfectly understand the principles restricting leading questions, or are so inexperienced that they cannot apply the principles to their questions. Thus, most questions that the judge perceives to be offensive are probably unintentionally improper. This inability to distinguish the accidental inappropriate question from the deliberate violation of the prohibition against improper inquiries may account for the weakness of the usual sanction, especially where the incorrect interrogatory is not part of a pattern of misconduct. In any event the harm caused by isolated examples of leading is likely to be slight.⁸⁷

Occasionally, however, even single instances of leading can be patently intentional and obviously important. Consider the following example of a plaintiff who fails to mention a rupture when testifying on direct without leading questions. The direct examiner then asks "Did you receive a rupture?" An objection is made to the inquiry, so a neutral question follows: "Did you receive anything else?" "Yes sir; I am ruptured from going through that culvert."⁸⁸

Though it would be wrong to say that no case of isolated improper inquiry justifies a sanction more severe than striking the offending question, such cases are rare. What is not unusual is the repeated use of improper leading questions. In such a situation, as the dangers behind inappropriate questions increase, the sanctions should become more severe. Again, the judge will be influenced by whether the course of conduct is intentional, but deliberate action is somewhat easier to infer from the context of repetition and the judge's knowledge of the age and background of offending counsel. Where the problem is one of inexperience the judge may consider a short, friendly lesson in how to frame questions

87. The inevitability of a certain amount of inadvertant objectionable leading has been recognized as a justification for the weakness of the usual sanction. *E.g.*, in *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693, 45 A. 955, 956 (1900) the court observed: "This result is an incident of that imperfection attaching to all that man does, and from which even judicial procedure cannot be kept free. The only remedy is a preventive one and lies in the power of trial courts to regulate the conduct of counsel at the bar."

Note that the effect of requiring rephrasing is not non-existent a new form does not eliminate suggestion problems, but in requiring the witness finally to respond in her own words, it may reduce or eliminate ratification, which may be, as noted, the worst problem.

88. *Vanderbilt v. Central R.R.*, 71 N.J.L. 67, 58 A. 91 (1904). This example reflects the situation of "omitted detail," discussed above, which would have justified some specificity. *See* text at note 61 *supra*. It also illustrates the point made there that the questioner can go too far.

on direct.⁸⁹ If the problem is one of incompetence which is not a result of inexperience or not correctable by instruction, the judge may consider taking over the direct examination himself,⁹⁰ he may simply decide to let the lawyer muddle through to avoid denying the client the chance to have a case,⁹¹ or he may feel some other sanction is justified. If there is an intentional abuse of the questioning process, the other sanctions, listed previously, become more appropriate and even necessary. Using a range of punishment a good judge should be able to avoid abuse of the questioning process, though this may often be more of a struggle than Wigmore seems to have realized.

In this regard we call particular attention to the device of striking a question and not allowing it to be rephrased. Although the nature of the sanction makes its casual application unlikely, it is at least a potential intermediate sanction with real teeth. It is also true that little danger exists of a judge's being reversed for allowing or acquiescing in a questioning process which violates the principle against improper leading. But

89. We say this almost tongue-in-cheek, considering that this article is being written to show that problems of questioning are difficult beyond "short friendly lessons." Yet some hints on how to take offending detail out of a question may have results and there is authority that the judge may offer such advice. See note 91 *infra*.

90. There is authority for the judge thus to take over the examination, although it would be of questionable propriety in a criminal case, at least if done to save the prosecution. See *Berwind White Coal Mining Co. v. Firment*, 170 F. 151 (2nd Cir. 1909); *Lowry v. Commonwealth*, 23 Ky. L. Rep. 775, 65 S.W. 434 (1901). See especially *People v. Mees and Valenzuela*, 47 N.Y.2d 997, 394 N.E.2d 283, 420 N.Y.S.2d 214 (1979).

91. The following excerpt from *U.S. v. Gant*, 487 F.2d 30, 35 (10th Cir. 1973) is poignantly illustrative of both a not-too-helpful attempt to educate and its failure, followed by an allowance of "muddling through."

Counsel for Gant also argues that the trial court should have prevented the attorney for co-defendant Doyle from asking excessive leading questions. From the record it appears that a genuine effort was made by the trial court to prevent this and the judge finally gave up, apparently being of the opinion that counsel for Doyle was unable to ask a question which was not leading. We are at a loss to know what a trial court can do when faced with this condition. The judge sought to prevent it and help the attorney, and he did everything short of taking over the examination himself. We fail to see this as a source of error on the judge's part, and we fail also to see that there was any prejudice to the appellant arising from this.

In a footnote the appellate court cited examples of where the trial court warned the attorney against leading.

Well, look, you are completely leading this witness, and for a day and half I have been trying to tell you how you should do it, and please, please, this is a sensitive area, now don't lead the witness. Let the witness testify.

He further commented: I am criticising you because you are asking leading questions. You are testifying in effect counsel. Let the witness testify.

Again, he explained: Well now you are leading her. Do you know what a leading question is?

And again: [Y]ou don't put words in her mouth. I have told you and told you and told you.

Finally, in response to an objection by counsel for defendant-appellant that the questions were still leading, the trial judge acknowledged: I know it, but he can't do it any differently. Go on. . .

Id. at 35 n.5.

this should not obscure the fact that judge's discretion is properly one structured by principled consideration.

THE OBJECTION "TOO GENERAL" OR "LACK OF SPECIFICITY AS TO TIME AND PLACE", ETC.

Given the many circumstances where it is objectionable to improperly lead a witness, it is ironic that situations arise where it is objectionable not to lead. Wigmore does not deal specifically with any objection to questions as being "too general," but that objection, sometimes made in terms of "indefinite" and "lack of specificity," seems to have some currency.⁹² The objection appears to be used to cover a number of loosely related phenomena.

First, the objection often means the question calls for a narrative.⁹³ *Second*, the objection is sometimes applied to situations where the question may not call for narrative, but attempts to elicit a single answer which contains more than one piece of information, some of which is relevant and some of which is not. We will deal with this latter problem first.

A. Questions Which Call for Answers Containing Both Relevant and Irrelevant Information

Suppose the interrogator wishes to show the defendant's habit of always locking her door. The attorney asks the witness "what were the defendant's personal habits?" Although the question is not technically wholly irrelevant, it is too general since much of the answer demanded by the question is irrelevant.⁹⁴ Thus, sometimes the objection is used to show that the relevancy of the answer cannot be determined with certainty,⁹⁵

92. C.J.S. discusses questions being "too general" and "too broad," 98 C.J.S. *Witnesses* § 328(3) (1957); or "indefinite," "uncertain" or "vague." 98 C.J.S. *Witnesses* § 328(4) (1957).

93. See note 106 *et seq. infra*.

94. The term "indefinite" often seems to be used when the missing factor is one of time or place while "too general" is applied when it is something else, though this falls short of a standardized practice. See generally the numerous cases collected at 98 C.J.S. *Witnesses* § 328(3) & (4) (1957). Dealing further with the clutter of specific cases beyond the text treatment does not impress us as edifying or important. To compound the confusion in this area, in some cases, the terms "uncertain," "indefinite" etc. are used to mean "ambiguous," not "too general" in the sense used here. See *e.g.*, *People v. Machado*, 6 Cal. Unrep. 600, 63 P. 66 (1900).

95. Occasionally a witness, when asked a proper question may answer in a nonresponsive fashion, nevertheless providing relevant and unobjectionable information. If the answer were objectionable it could be stricken on the appropriate basis. If the answer is relevant and not subject to any other objection, is it to be subject to objection simply because it was not in response to the question? There are three distinct approaches. One view is that either party may object to the admission of information which was not sought by the question. The Cal. Evid. Code § 766 states that "A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party." This position makes the mere non-responsive nature of the answer objectionable, regardless of the rele-

because the facts upon which relevancy depends have not been established by earlier testimony. This second usage is based on the failure of the lawyer to expose the relevance of the answer. In this context, one usual form of the objection is "lack of specificity as to time and place."

Consider the following example of this problem: X is prosecuted for rape. X claims impotency to prove his innocence. The prosecution calls Y to whom X has bragged about his sexual prowess. The record must ultimately reflect that the bragging, to be admissibly relevant, took place within a reasonable time proximity to the alleged rape. The witness is asked, "did you have any conversations with the defendant concerning his sexual prowess?" If the witness responds "yes," the next question might be "what was the substance of those conversations?" This question might draw the objection "too general" or "lack of specificity as to time," but note what is really being attacked is not the structure of the question itself but the failure to ask "when did the conversation occur?" between questions one and two.⁹⁶

Finally, the law sometimes requires a *cross*-examiner to include specific details such as time and place in a question as a condition to receiving an answer. When this is not done it may also be objected to by the phrase "too general" or "lack of specificity as to time and place." Note that as a result of this the phrase "lack of specificity as to time and place" as an objection has two aspects. It may mean the answer called for is

vance and the value of the information presented. Another view recognizes the right of the examining counsel to move to strike the otherwise unobjectionable testimony because it was not in response to the question. Under this view the non-examining counsel may not object to such otherwise unobjectionable testimony. Thus the questioner is free to adopt the witness' answer if he so chooses. This is the rule in New Jersey. (*State v. Cioffe*, 128 N.J.L. 342, 26 A.2d 57 (1942)). The third position is that of Wigmore. Wigmore denies either party the right to object to testimony which is relevant and not otherwise objectionable. Even the questioner must permit the answer to stand. "No party is owner of facts in his private right. No party can impose silence on the witness called by Justice." (3 WIGMORE, note 3 *supra*, at § 785, p. 201). Wigmore's position is perhaps inappropriate because he does not consider in his equation the need of an examiner, especially a cross-examiner, to be able to control the development of the issues. Wigmore's denial of any right to object may go too far, but the opposite position, that both can object, is certainly indefensible. There seems to be no justification for allowing an opposing attorney to be able to break the pace of the questioner by permitting an objection that the answer does not respond to the question. Such an opportunity merely creates a new and fertile domain for raising pointless objections. Considerable amounts of time could be spent debating whether an answer was in fact responsive or not and a decision that it was not could only result in the examining counsel simply rephrasing the question to elicit the previously stricken testimony.

96. The practical problems of such questioning are highlighted by the fact that the question "did you have any conversations with the defendant concerning his sexual prowess in July 1977?" might be found leading as containing too much detail, and the question "what was the substance of those conversations which took place in July, 1977?" would be objectionable as assuming a fact not yet testified to by the witness, i.e. that there were such conversations.

irrelevant without the establishment of the conditions of time and place. As such it is an objection based on the failure to establish an evidentiary foundation. A second meaning exists when despite the relevance of the answer, the question is required to specify time and place as a precondition to getting an answer. The purpose of this specification is to give fair notice to the witness and is dealt with separately below.⁹⁷ The former interpretation is usually what is meant by the objection when the questioner is engaged in direct examination; the latter when the questioner is conducting cross-examination.

B. Questions Which Call for Narrative

It is not proper to overly direct a witness by specific questions. But is it necessary to use the traditional question-and-answer process? The historical alternative to the more recent question-and-answer method is the narrative format. Edward Abbot Parry noted the early use of narrative:

In a state trial in the days of Queen Anne, the name of the lady is announced in the oath, and then counsel approaches her. . . . "Pray, madam, will you be pleased to acquaint my lord and the jury what you know concerning the matter, and what passed between your brother, Mr. Colepper and Mr. Denew at his first coming to him?"⁹⁸

By the early twentieth century Wigmore could write "since the mid-19th century the trend has been to oppose narration: the fear of permitting inadmissible matter prevailed, the fear became an obsession."⁹⁹ The pendulum, however, has now begun to swing back toward the narrative. The rule in most states is that neither form of questioning is required nor preferred over the other.¹⁰⁰

The element separating an inquiry calling for a reasonable narrative from a question that is objectionably general is the implied qualification in the question "then what happened?" of "then what happened *which is relevant?*" It should be clear from the context of the interrogation that this qualification is present and the witness both understands and can obey to a reasonable degree the implicit limits on the scope of her testimony. If the request for narrative has not been preceded by sufficient directed questioning to establish the boundaries of what may reasonably be expected in reply, the question which calls for a narrative may very well be found to be "too general" without denying as a general proposition that narrative is permissible in a proper context. The question which calls for

97. See text accompanying notes 106 *et seq. infra*.

98. E. PARRY, *THE SEVEN LAMPS OF ADVOCACY* 84 (1927). See also Lord Grey's Trial, 9 Howe St. Trials 127 (1652); J. CHITTY, 3 *PRACTICE OF LAW* 784 (1835), all quoted at 3 WIGMORE, note 3 *supra*, at § 767.

99. 3 WIGMORE, note 3 *supra*, at § 767.

100. MCCORMICK, note 3 *supra*, at 7. But California does not appear to be so liberal. See B. JEFFERSON, note 3 *supra*, at § 27.6, p.366.

narrative should not be unnecessarily broad. While the risks of improper testimony springing forth unannounced are always present with narrative testimony there is no need to run unnecessary risks of surprise. The witness should be directed as precisely as possible to the subject matter of the narration.

With this qualification in mind, the modern view is that a party should usually be allowed to receive the benefits of narrative answers if he desires them.¹⁰¹ Only when the opponent of the questioner can convince the judge that there are good reasons not to allow such a question should the judge require more directed questioning.

It is important, however, to note that the trial judge sometimes should require more directed questioning. Two major reasons will support such a decision: (1) the witness will not confine herself to relevant information and (2) the witness will volunteer incompetent, though relevant, information.¹⁰²

The nature of any narrative is such that some bits of information having little or no legal relevancy are included in the flow of the story. That problem itself should not render all narrative objectionable, since mere irrelevancy of some details is not very dangerous to the truthfinding process. Often less time is wasted by letting the story be told than by debating which details are sufficiently relevant to be heard. The dangers of improper testimony, however, rise as the percentage of irrelevant detail goes up. At some point the relevant information may get lost in the chaff, or the jury may start confusing the chaff with the wheat simply because there is so much irrelevant material before them. Thus, the propriety of narrative is dependent to some extent on the witness' understanding of what is relevant to the legal issues of the case, and her ability to follow that understanding in her narrative. Whether a person can thus limit her account will usually not be apparent until some time after the narrative has begun.

The problem of relevant but incompetent information is somewhat different. In such a case the opponent is more specifically injured, since a motion to strike after the jury hears the objectionable information, followed by an instruction to disregard the question and answer, is simply

101. There may be good reason for the law to prefer and the proponent to elect narrative testimony. Contrary to traditional expectations one study suggests that narrative testimony tends to be more accurate in the details which actually come forth from the witness, though important information may be left out. More directed testimony appears to be more complete but less accurate. See Marshal, Marquis and Oskamp, *Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony*, 84 HARV. L. REV. 1620 (1971).

102. McCormick mentions only the danger of incompetent evidence. MCCORMICK, note 3 *supra*, at 8. The irrelevancy point is noted in MAGUIRE, WEINSTEIN, CHADBOURNE & MANSFIELD, note 3 *supra*, at 281, and 3 WIGMORE, note 3 *supra*, at § 767.

not as effective as an anticipatory objection which prevents the jury hearing the information. If an opponent knows what information he fears in advance a motion *in limine* and an instruction to the witness should avoid this particular problem.¹⁰³ The general problem is, however, broader than this single solution. The opponent may be most worried about the incompetent information the witness possesses, but about which he knows nothing. Of course, more directed questioning still might not warn him to object until it is too late, and the witness might herself provide sufficient anticipatory cues in her narrative to make an interrupting objection effective. Nevertheless, every narrative carries a higher risk of exposing incompetent information to the jury than would be present with a process of more directed questioning. If the judge senses real danger, she should not hesitate to question the proponent attorney who desires narrative concerning the lawyer's knowledge of potential jacks-in-the-box.¹⁰⁴

Of course, risks of irrelevant and incompetent information are present in any narrative testimony. The judge should allow narrative to be used unless and until the resultant risk of those two problems, in relation to any given witness, is too high to be fair. The presumption is in favor of narrative. This statement is as definite a principle as we have been able to formulate.

It might be that, theoretically, these principles concerning narrative testimony also apply to cross-examination. Questions calling for narrative, however, are almost never asked on cross. If such a question is asked, it is almost certainly an indication that cross is going beyond the scope of direct and should be restricted to the questioning process appropriate for direct examination.¹⁰⁵

THE REQUIREMENT OF FAIR SPECIFICITY FOR QUESTIONS ON CROSS-EXAMINATION

As noted, in most cases narration should be allowed on direct examination. Theoretically, the general principle allowing narrative also holds true for cross-examination, though it is a rare attorney who wants such open ended answers. If, however, a cross-examiner is seeking a specific detail, he may be *required* to lead by including very specific information in the questions.

The problem under consideration commonly arises in the context of

103. For a discussion of the general availability of the motion *in limine*, see WRIGHT & GRAHAM, note 2 *supra*, at § 5037.

104. The plural form adopted approaches each witness as one box.

105. There may be certain instances where narrative repetition is asked for on cross to show that the witness has memorized a script. The story of the cross-examination of the chief witness in the *Triangle Shirtwaist Fire* litigation told by Irving Younger during his National Institute of Trial Advocacy Videotape on Cross-Examination is a good example.

establishing prior inconsistent statements. The principle requiring fair specificity of questioning is based on the same considerations that prompt the requirement of laying a "foundation" prior to the introduction of extrinsic evidence of the impeaching statement. A prior inconsistent statement could be established without asking the witness for an explanation. Such a course is unwise for two reasons. First, there is the rational objection that the statement might be explainable in such a way that its bare admission might be misleading. Second, there is an individual fairness consideration. Since the prior statement raises a potential inference of intentional lying, any person, party or witness, should have an opportunity to explain such circumstances before being embarrassed by inconsistency.

Thus, specificity of questioning is generally a preliminary requirement for the introduction of extrinsic evidence of a prior inconsistent statement. Since a negative response to the question "did you ever tell anybody anything different from your testimony today concerning the episode?" may merely reflect a lack of immediate memory, specificity of questioning, usually as to time, place and person spoken to, is required to establish the denial which is a pre-condition to the introduction of extrinsic evidence.¹⁰⁶ Although some jurisdictions would allow the previous general question if it is followed by specific inquiry, other courts would find such an inquiry as objectionable *per se*.¹⁰⁷

The requirement of fair specificity is not limited to the establishment of prior inconsistent statements, but sometimes applies to any question on

106. This principal, at least as to prior inconsistent statements, seems to derive from *Queen Caroline's Case*, 2 Bood & Brig 284, 129 Eng. Rep. 976 (1820). "The Rule in the Queen's Case," as it is called, really has two distinct branches; that applying to oral prior inconsistent statements and that applying to written prior inconsistent statements. The oral branch says that (1) an oral prior inconsistent statement may not be proved unless inquiry is first directed to the witness concerning it and (2) the inquiry must be specific. The written statement branch holds that (1) a written prior inconsistent statement may not be proved unless inquiry is first directed at the witness concerning it and (2) the inquiry must be made by showing the witness the writing. The Rule in the Queen's case is much maligned because of some quite silly applications it has unnecessarily been given. Some courts have held, without credible justification, that it should be applied to absent hearsay declarants, thus defeating the admission of prior statements to impeach hearsay declarants. See cases collected at MCCORMICK, note 3 *supra*, at 73 n.5. Others have held that it must be mechanically applied even when the existence of the prior statement is not discovered until the witness has left the court. Also, critics have pointed out that while fair specificity of notice may be justified in oral questioning, allowing the witness to examine a writing at leisure may allow too much time to make up a good story. Many codes, including the Federal Rules of Evidence, (F.R.E. 613) and the N.J. Rules of Evidence (N.J.R.E. 22) have abolished the requirement of showing a written statement to the witness, and have given the judge latitude to relax the other requirements as justice requires.

107. Disallowance of the general question is subject to criticism by the "general to specific" school of effective cross-examination. For an example of such a criticism and an attack on the notice requirement generally see (and hear) I. Younger, *Cross-Examination Video-tape*, note 105 *supra*. See also MCCORMICK, note 3 *supra* at 46-49.

cross, where knowledge of time or place can aid the witness in framing an answer.¹⁰⁸ Although considerations of efficiency may prompt such an application of the principle of specificity, the parrot-like objection "lack of specificity as to time and place" can imply a "rule" where none should exist. As a result of this lack of understanding, the judge may unnecessarily require such "punch telegraphing" specificity that the right of effective cross-examination is diminished.

THE REQUIREMENT OF REASONABLE SUSPICION—THE CROSS EXAMINATION PARALLEL TO THE LEADING QUESTION RULE

A. The Principle

There are times when questions should be found improperly leading even when the inquiring attorney is formally engaged in "cross-examination." For the reasons already discussed, cross-examiners generally are allowed to lead since there is no apparent danger of improper ratification or suggestion involving the witness. The danger of improper suggestion affecting *the fact finder*, however, still exists. Many, if not most, questions on cross carry an implication that the examiner knows what the answer to the inquiry should be. There is an inherent danger that the jury will be influenced by the cross-examiner's suggestion that information supporting the conclusion behind the question is available. If this happens, the lawyer becomes in effect an unsworn hearsay source.¹⁰⁹

The potential for improperly leading the jury is an unavoidable part of the process of questioning. It is controlled on direct as a by-product of the prohibition against improper leading of the *witness*. Since no similar limit restricts cross-examination, the requirement of reasonable suspicion is designed to meet the problem.¹¹⁰ Yet, this check presents no great hurdle in the formulation of questions on cross.

The only way to completely eliminate the difficulty of suggestion to the jury would be to prohibit specificity of questions on cross as well as direct, but that would eliminate cross as we conceive it. Legal traditions and instincts appear to be diametrically opposed to such a result, and require leaving the widest reasonable latitude in the questioning process

108. The rationale of the principle both as to specificity of notice and to foundation for extrinsic evidence would seem to apply as cogently to circumstances of bias, interest or corruption, or other maligning forms of impeachment. At least one of the authors has seen the requirement commonly invoked in the New York courts in such other contexts.

109. 3 WIGMORE, note 3 *supra*, at § 1808(2).

110. The requirement is reflected in the Code of Professional Responsibility forbidding counsel from alluding to "any matter that he has no basis to believe is relevant to the case or that will not be supported by admissible evidence." DR 7-106(c). For a full discussion of the problem and the requirement *see* *In re Contempt of Ungar*, 160 N.J. Super. 322, 389 A.2d 995 (1978).

on cross. We could require counsel to ask no questions implying facts which cannot be proved by then existing independently admissible evidence. But such a "rule" is generally felt to constrict the range of possible cross-examination too much, so instead we merely require:

(1) As to all questions, counsel should know that what is implicit in the inquiry is not false.

(2) As to any question suggesting a fact potentially of great importance, the attorney must have a good faith basis for believing that what is implied has a reasonably good chance of being true.¹¹¹

The first requirement is readily understandable, but cannot stand alone. In most cases the question, "have you ever committed sodomy with a parrot?"¹¹² would meet test number one because the questioner would be unlikely to have affirmative knowledge that the witness had not committed sodomy with a parrot. Yet, the question is one which may be considered as making an improper suggestion to the jury. Since the majority of people do not commit sodomy with parrots, the question implies special knowledge of the witness' parrot centered proclivities. Note that under principle number two, only a good faith basis for belief that there is a reasonably good chance the implication is true, is required.¹¹³ Two things should be observed: First, requiring a belief that the implication suggested by the question is more likely true than not would impose too high a standard. Reasonable suspicion may be checked out on cross. Second, the sources of information from which the reasonable suspicion has been derived need not themselves be admissible. Commonly, the details may come from hearsay or even multiple hearsay, and still give rise to sufficient suspicion to support a question.

B. Enforcement

Courts are more aggressive in applying sanctions for improper factual implication without reasonable basis, than in levying sanctions for improper leading. Improper implication, uncorrected by the trial judge,

111. Logically, requirement 1 is entailed in requirement 2, but we have stated them separately for illustrative purposes.

112. The illustration is Professor Younger's. *See* Younger, Cross-Examination Videotape, *supra* note 105. The question of whether showing sodomy with a parrot would be proper impeachment in many jurisdictions must be answered in the negative under the general prohibition against showing specific instances of conduct not the subject of conviction, in order to show propensity to falsify; but it would be admissible in Professor Younger's New York, even in the face of its tenuous relevance, under the authority of the not-too-convincing case of *People v. Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950).

Indeed Wigmore finds one rationale for the prohibition against raising such specific instances to be the "opportunities they offer for fraudulent insinuations of misdeed which the counsel has in reality no reason to suppose were ever committed." 3 WIGMORE, note 3 *supra*, at § 780(c).

113. *See generally* *In Re Contempt of Ungar*, 160 N.J. Super. 322, 389 A.2d 995 (1978).

constitutes harmful error.¹¹⁴ Further, trial judges seem to be fairly receptive to such objections because of the lack of any alternative explanation for such questions other than a willful attempt at chicanery. Note that a simple withdrawal or striking of the question without any instruction to the jury does not affect the problem. With varying degrees of thoroughness, most courts add instructions to the effect that a question is not evidence.¹¹⁵ Still, it is doubtful whether such instructions sufficiently correct the harm. The declaration of a mistrial may sometimes be appropriate, if the offending side would be harmed by a mistrial. To expose an attorney's lack of basis for the question asked, at least one court has allowed the offending attorney to be placed on the witness stand and examined.¹¹⁶ The proper use of this device, or in the alternative a voluntary in-court admission from the attorney concerning his lack of basis for the question, would probably deter this abuse. Still, because effective sanctions have not regularly been used, improper implication appears to be more widespread and the bar more willing to attempt it than it should be.

QUESTIONS WHICH ALERT THE JURY TO THE EXISTENCE OF INCOMPETENT INFORMATION

A problem related to improper jury suggestion can be found in the type of question which alerts the jury of the existence of relevant but otherwise inadmissible information, such as hearsay, etc.¹¹⁷ This situation may arise on either direct or cross-examination. In these cases, the need for latitude on cross-examination offers no justification for the question. The availability of the judge to rule on the propriety of a particular question means the attorney can be held to a high standard of reasonable belief that the suggested detail is competent. This criterion is more demanding than the "good faith, reasonable suspicion" standard for cross-examination previously discussed.¹¹⁸ Most violations are likely to be willful, and the damage is hard to cure by instructions which tend to exacerbate the problem by emphasizing the incompetent information.

One sad aspect of this problem is that lawyers generally are more likely to feel comfortable slipping incompetent evidence in front of the

114. *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1964). See also cases collected at 3 WIGMORE, note 3 *supra*, at § 1808.

115. Wigmore adds that the questioner should be forbidden from asking any more similar questions, an obviously desirable result. 3 WIGMORE, note 3 *supra*, at § 1808(2).

116. *United States v. Pugliese*, 153 F.2d 497 (2nd Cir. 1945). A fictional account of a similar tactic is immortalized in 3 WIGMORE note 3 *supra*, at § 1808(2), where Wigmore quotes from an article by A. Train, where Mr. Train in turn quotes the episode from a story called *The Bloodhound* which appeared in the *Saturday Evening Post*, June 10, 1922.

117. Wigmore treats both improper implication of non-existent fact and improper implication of incompetent evidences as a single unit. See 3 WIGMORE, note 3 *supra*, at § 1808(2).

118. See text at note 109 *supra*.

jury than they would if slipping in affirmatively false assertions of fact. It is easy to hide behind a model of the adversary system where parties are free to waive objections to the hard problems of professional responsibility which lurk here. Under such a model, exposure of improper information may be a test to see whether an opponent wishes to waive her objection, either for tactical reasons or by not being alert. This is not the place for a detailed examination of this kind of philosophy.¹¹⁹ Even if there is some validity to the "waiver" rationale in some contexts, a question by itself is not a proper means for putting information before the jury. In such situations a mistrial is much more likely to be necessary.¹²⁰ With or without a mistrial, a citation for contempt or other disciplinary sanction should be given more consideration than usual.

THE PROHIBITION OF QUESTIONS WHICH CONTAIN "TRICK ASSUMPTIONS"

We now turn to a principle of fair questioning that is applicable most often to inquiries made during cross-examination.¹²¹ A question should not be framed to create the risk of an unintended ratification of material not reflecting the witness' actual position. This principle is suggested by objections made under various names, such as "misleading questions,"¹²² "the question assumes a fact not in evidence,"¹²³ or "the question is a

119. The Code of Professional Responsibility, DR 7-106(c) seems to place a burden on the proffering attorney to have a legitimate expectation of admissibility even over objection. See note 105 *supra*.

120. See the opinion of McFarland, J. in *People v. Wells*, 100 Cal. 459, 34 P. 1078 (1893).

121. Questions containing unfair assumptions may be asked on direct also, but this seems to be rarer because the greater generality required of questions on direct usually makes the framing of a question reflecting an assumption of any important detail difficult. When such a question does occur on direct it is usually classified as a form of leading. They were so treated by Wigmore. See 3 WIGMORE, note 3 *supra*, at § 771 & § 780.

We agree but wonder how Wigmore got there with his concept of leading, emphasizing suggestions as it does. See note 23 *supra*. More often than not on direct a trick assumption does not suggest anything to the witness. The witness ratifies without seeing the assumption. However, if one views the vice of leading as *unexamined ratification* as well as suggestion, Wigmore's identification of trick assumption questions on direct as leading seems correct.

122. The term "misleading" seems to be Wigmore's though he uses it only in his section heading. See 3 WIGMORE, note 3 *supra*, at § 780. It has been widely adopted. See, e.g., *DiBova v. Philadelphia Transportation Co.*, 356 Pa. 204, 51 A.2d 768 (1947); *McCORMICK*, note 3 *supra*, at 11; *MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD*, note 26 *supra*, at 280.

123. *LOUISELL, KAPLAN & WALTZ*, note 3 *supra*, at 13 & 27; *F. HEAFY*, note 3 *supra*, at § 15. The phrase "assumes a fact in evidence" misses the point and can only cause confusion. A fact is usually taken to be "in evidence" if sufficient evidence to justify a finding of that fact is on the record from any source. Yet it is still unfair to trick a corroboration of the fact from a witness if the witness was not the original source of the information putting the fact "in evidence." Wigmore referred to the problem as assuming "a fact which may be in controversy." 3 WIGMORE, note 3 *supra*, at § 780. But that phrase and the related "assumes a fact in issue" go too far the other way, for even if this very witness has just testified to the

compound question.”¹²⁴ We use the label “questions with trick assumptions” because the designation seems to describe the essence of all these objections.

The vice of such a trick question¹²⁵ is that it conceals an assumption of fact which the witness may unwittingly adopt by giving a certain answer, or sometimes simply by giving any answer. To make matters worse, if the witness perceives the trick, his response may manifest a confusion which unfairly makes him appear reluctant or dissembling. The most famous example of this problem is the question “have you stopped beating your wife?”¹²⁶ The inquiry assumes the witness has beaten his wife at some time. Either a “yes” or a “no” answer appears to ratify the assumption, while a reluctance to answer gives the appearance of wishing to be less than frank. Note that the question is not totally unanswerable as has sometimes been suggested. An alert and confident witness might respond “I have never beaten my wife.”¹²⁷ But no one can expect all witnesses to

fact assumed (which would make the incorporated assumption unobjectionable) the fact is likely to be still formally “in controversy” or “in issue.” If one is seeking a phrase to describe such trick assumptions, the proper formulation would seem to be “assumes a fact not testified to by this witness.” The phraseology selected in MCCORMICK, note 3 *supra*, at 11, comes closest to the mark. Incidentally, such questions are also sometimes referred to as “loaded” questions.

124. The subject of compound questions is dealt with separately at note 134 *infra*.

125. There are at least three distinct aspects of courtroom trickery. First, it is indefensible to trick the jury by conveying information in the course of the examination of a witness, either through the displaying of objects or by asking improper questions laden with improper messages. If counsel holds a blank sheet of paper while examining a witness in such a way as to suggest to the jury that the paper contains a non-existent statement, that is an example of unfounded implication of fact to the jury.

Second, tricks which cause the witness to present information which is inaccurate because of the confusion or misunderstanding caused by verbal tricks are improper. Thus questions designed to cause the witness to answer one meaning of a question while the jury understands the answer to be in response to another meaning are forbidden.

A third aspect of courtroom trickery is not objectionable. It is not improper to trick a witness if the trick is designed to test the witness in certain relevant dimensions and not to create misperceptions. For instance, if counsel has reason to believe that a certain document was written by the witness but has since been destroyed, he may hold a similar looking document during examination hoping that its presence will cause the witness to be truthful. This does not exhaust the ground for such “fair tricks,” *see, e.g.*, the examination of Westbrook Pegler described by L. NIZER, MY LIFE IN COURT 112-115.

126. Wigmore attributes the formulation of this question to Sir Frank Lockwood in the nineteenth century. 3 WIGMORE, note 3 *supra*, at § 780 n.1.

127. That is, if he were allowed so to answer by the judge. There is a rather general assumption that since cross-examiners have a right to frame questions answerable by “yes” or “no,” that they therefore have a right to a “yes” or “no” answer in response. Some even go further and find a right to demand that the answer be restricted to only “yes” or “no.”

It is generally recognized that a judge may allow further explanation but it is held to be within his “discretion” that he need not. What is striking is the dearth of in-print discussion of these issues. Neither Wigmore nor McCormick mention the problem and even C.J.S. and AM. JUR. only mention the issues of allowing explanation without mentioning the antecedent question of the yes-or-no answer. The only decent discussion we have found is in K. HUGHES, note 4 *supra*, at § 185, p. 200. Given the myriad subtle ways in which “yes or no”

be so ready, sure and quick-witted, especially in the disorienting circumstances of public cross-examination in a court room. The judge should protect the witness and the opposing party from the potential unfair results of such a question.

Any question as obvious as "have you stopped beating your wife?", is almost surely an intentional attempt to trick the witness. It is also easily spotted. Many trick assumptions, however, are much more subtle, do not always require "yes or no" answers and may be asked quite unintentionally while attempting to formulate a more complex or penetrating question. Indeed the question which intuitively appears difficult to answer is often hard to answer because it is unfair on a level not consciously analyzed by the cross-examiner. Suppose a witness admits a prior inconsistent statement. The inquiry "well, which one is the truth?" may seem perfectly natural, and is often heard. When asked, the question often precipitates a buzz of confusion, which may or may not result in an objection. Yet, on closer examination the question reveals itself to be a trick question, because it assumes that only one statement is "the truth" (in the sense of being honest), when it is quite possible that both declarations were truthful when made. Many pet questions contained in the cross-examiner's arsenal are in reality trick questions which should be disallowed upon proper analysis.

A common, though not exclusive, problem associated with trick questions is that they create false dichotomies.¹²⁸ Dichotomous questions ask the witness to choose one of two contradictory alternatives. They are unobjectionable if the dichotomy is proper, but it is often difficult to tell instinctively whether the classification is proper or not.

Dichotomy is a division into two parts. If it is properly drawn, the parts are mutually exclusive and collectively exhaustive, so that there is no overlap, no opening in the middle and nothing omitted at either end The law of the excluded middle may demand instant obedience in formal logic, but . . . it is as intricate in its applications as the internal revenue code. Dichotomy is used incorrectly when a question is constructed so that it demands a choice between two answers which are in

questions can be unfair, both the substance and the tone of the popular understanding should be deemed simply wrong.

There are, of course, times when a judge should not allow a witness to escape a fair forced choice between yes and no. Often, however, either the question or the situation make such a choice unfair, and it is the duty of the judge to be aware of this and to protect the witness who resists answering "yes" or "no" against it. Further, while it is possible qualifying explanation sometimes may be undertaken merely to confuse matters, still it is unlikely ever to induce a more accurate impression to let the bare forced choices "yes" or "no" remain the exclusive record (at least until redirect) when the witness expresses a desire to qualify, and judges should structure their exercise of "discretion" accordingly. *See generally* R. KEETON, note 3 *supra*, at 145.

128. *But see* note 136 *infra* and accompanying text.

fact not exclusive or not exhaustive.¹²⁹

The likelihood of misanalysis or misinformation is great when a witness is confronted by this situation. The following quotation reflects some possible responses when a person is confronted with a false dichotomy.

He can try several stratagems. First, he may attempt to show that the dichotomous terms can coexist. Second, he might demonstrate that there is a third possibility. Third, he might repudiate one of the other or both alternatives. All of these devices will work, in a limited way. But all of them will have the effect of shackling the student's answer to the fallacious conceptualization he is attempting to correct.¹³⁰

The problems of a witness, especially on cross-examination, are greater because of the limited time to think and the existence of fewer choices. The main problem of the courtroom attorney in dealing with such misleading questions lies in recognizing them quickly enough to object effectively. In this area there is often a clue, however. When a witness resists answering a question "yes" or "no" for intuitive reasons, the attorney should immediately begin looking for a hidden assumption or false dichotomy, and object accordingly.¹³¹

Although trick questions are sometimes hard to spot,¹³² they are easy to deal with once identified. If the trial judge not only sustains an objection, but explains the danger of the "trick" to the jury, the jury is unlikely to be misled by the question. In addition the cost of being identified as a "trick questioner" to the jury, even if the form of the inquiry is unintentional, is likely to make any cross-examiner more cautious.

THE REQUIREMENT OF FAIR CLARITY FOR QUESTIONS

The principle requiring clarity in the form of questions applies to questions on direct and cross-examination. For two reasons, however, the danger of misleading the witness or the jury by unclear questions arises mainly on cross:

1. The more particularized questions allowed on cross-examination carry with them greater potential for subtle lack of clarity.
2. The direct examiner generally has a motive to promote clarity of information from her own witness, while the cross-examiner may more often benefit from induced confusion.

Inquiries which lack clarity may profitably be classified as either

129. D. FISCHER, note 18 *supra*, at 8.

130. *Id.* at 9.

131. And, of course, the judge should be cognizant of the existence of such situations and sympathetic rather than resistant to such objections. See note 127 *supra*.

132. About the only way to train one's self to recognize such questions efficiently is by examining a number of examples in context. We considered including such a collection in this note, but we decided that providing such a drill was beyond our purpose; 100 A.L.R. 1062 (1936) contains a selection of such questions. See also the cases briefed at 98 C.J.S. *Witnesses* § 341 (1957).

unintelligible or ambiguous. Unintelligible questions are those which are phrased so poorly that nobody—witness, judge, jury or opponent—knows what they mean. They are presumably never intentionally asked, and are generally objected to and rephrased. Their only vice is the waste of time.

More commonly, questions may be ambiguous, that is, capable of being construed in more than one way.¹³³ This creates three correlative dangers: (1) If the ambiguity is unnoticed, the witness' answer may be directed to an interpretation differing from the jury's understanding of the question; (2) The witness does not see the ambiguity, but some or all of the jury will perceive it, making the witness look less than sharp; (3) If the witness sees the ambiguity, but the jury does not, the witness' uncertainty may make it appear she is being less than frank.

Ambiguous questions, like trick questions, may be framed unintentionally and hard to identify. Take the following example: A witness testifies to her eyewitness identification of a criminal defendant. On cross she is asked, "are you sure there is no possibility you were mistaken?" The question may initially seem to be natural and acceptable, but note that either a "yes" or "no" answer is ambiguous. The reply can mean "yes, I am sure," "yes, there is a possibility," "no, I am not sure" or "no, there is no possibility." Questions framed with both positive ("are you sure") and negative ("there is no possibility") clauses always create this ambiguity, yet it is a common question form in English. The ambiguity, however, does not stop with this problem. Suppose the question is rephrased to "is it possible you were mistaken?" If the answer is "no" the questioner can argue that this is the kind of witness who indulges in overstatement, since everyone knows there is always some possibility of mistake in observations. If the answer is "yes," the questioner can point out that the witness admitted the chance of mistake. The question is ambiguous because the word "possible" is ambiguous. In a theoretical sense it may mean "any possibility" while in a colloquial sense it may mean "significant possibility." Once an ambiguous question is recognized, sustaining an objection to the form will generally control the problem. Given the bewildering variety of ways a question can be subtly ambiguous, the chief difficulty is recognizing the ambiguity with sufficient speed and clarity to object effectively.¹³⁴

133. Wigmore does not mention unintelligibility or ambiguity as a separate ground of objection. Neither does McCormick. They are given as such in E. HEAFY, *supra* note 3. LOUISELL, KAPLAN & WALTZ, *supra* note 3 mentions "confusing" as a proper ground. LOUISELL, KAPLAN & WALTZ, note 3 *supra* at 12. C.J.S. contains citations to "confusing" and "unintelligible" and "unclear" as proper grounds. 98 C.J.S. *Witnesses*, § 328 nn.89, 90, & 91 (1957).

134. There is an intimate relationship between ambiguity and trick assumption. Often questions may contain elements of both phenomena. The question given in the section on trick assumptions, *supra*, illustrates this. The question, it will be remembered, was a question

A NOTE ON "COMPOUND QUESTIONS"

A compound question is a single inquiry which actually contains more than one question. Here is an example: "Did you go to the closet and remove a jacket from a hanger?" This compound inquiry entails at least five separate questions: "Did you go someplace?"; "If so, was that place the 'closet'?"; "If you did, did you remove something?"; "If so, was that something a jacket?"; "If you did remove something, was it from a hanger?" The terms of a compound question are not always explicit. If a witness testifies she was standing next to a sofa in a certain room, and that her jacket was on a hanger in the closet and is asked "did you then get your jacket?" the final question implies the same elements contained in the previous compound question.

Most questions can be analyzed as being somewhat compound since very few if any inquiries seek only logically discreet bits of information. Compoundness, however, only renders a question objectionable when other principles also come into play. Yet, when a question is obviously multi-faceted other objectional considerations will almost always be present, so that the phrase "compound question" has become a standard objection.¹³⁵

The most obvious way to frame a compound question is by the use of the conjunction "and." A long string of discreet questions connected to each other by "and" are difficult to remember, and can create confusion in the witness or the jury. Further, the effect of such a series of conjoined questions is subtly ambiguous even if all the component parts are kept straight. Take the question "Did you then open the door and step inside and remove your coat?" On direct it would be obviously leading. On cross it is not usually subject to that objection. A "no" answer, if forthcoming, must be taken as ambiguous, however, revealing the problem with the question. The listener cannot be sure whether each element of the package is being denied, or only the package as a whole. The answer may be analogized to the old common law pleading concept of the "negative pregnant." Curiously enough, a "yes" answer does not have the same

following the showing of a prior inconsistent statement: "Which statement was the truth?" The question assumes only one previous statement could be the truth and also capitalizes on the ambiguity of the term "the truth" which may either mean "honest" or "accurate." It might be further observed that the form of a question is usually designed not to elicit new information but to make a forensic point to the jury, and is therefore also subject to the objection of being argumentative. *See* text at note 139 *et seq. infra*.

135. The ground of objection "compound question" is not treated by Wigmore or McCormick. It may be originally a California usage. It is recognized, in E. HEAFY, note 3 *supra*, at § 8 and B. JEFFERSON, note 3 *supra*, at § 27.5. Most obviously compound questions asked on direct will be leading and may also be ambiguous or confusing. Questions which are asked on cross and are clearly multi-faceted will be ambiguous or create false dichotomies, or both.

ambiguity, because a "yes" can only be interpreted as ratification of the package. Still, the problem is serious enough that in most jurisdictions separable questions connected by "and" seem to be objectionable *per se*.¹³⁶

Separable questions connected by the disjunctive "or" are also compound questions and are sometimes said to be objectionable on that basis. The conjunction "or" does not, however, itself create the same inherent problems the conjunction "and" does. Instead the answerer must pick between the branches of the inquiry which, depending on the circumstances, can be a fair choice, resulting from a fair question. Yet, it is very easy for the forced choice presented to be an example of a false dichotomy, which, as discussed, is objectionable. This phenomenon probably accounts for the hostility with which even fair questions using the word "or" have sometimes been viewed.¹³⁷

THE PROHIBITION AGAINST QUESTIONS WHICH ARGUE TO THE JURY (ARGUMENTATIVE QUESTIONS)¹³⁸

The purpose of questioning is to elicit information for the fact finder's use in reaching a decision. Attempts to persuade the fact finder concerning the implications of the elicited information are reserved for closing arguments. That at least is the theory, but the distinction between inquiries which properly seek to gain information and those questions which are so rhetorical as to be improper is fuzzy at the edges. As previously noted, all questions carry the implicit assertion that the detail contained in some answer is relevant and worthy of serious consideration.¹³⁹ Questions clearly exist, however, whose main purpose is to argue the meaning of information already on the record rather than to elicit new knowledge. Take the following question on cross: "If you had heard your testimony, would you believe it?" The purpose is not to learn how the

136. See the excellent exposition in B. JEFFERSON, note 3 *supra*, at § 27.5.

137. *Id.* Jefferson treats the problems of dichotomy as one of compound question, emphasizing the explicit "or" and neglecting the possibility of a fair dichotomous question. As previously explained, we elected to introduce the problem of false dichotomy outside the context of the explicit "or" to show what a pervasive and subtle problem false dichotomies can present. See text at note 127 *et seq. supra*. Actually, questions using "or" simplify things by flagging the dichotomy.

138. The ground of objection "argumentative" is recognized by McCormick. See MCCORMICK, note 3 *supra*, at 11. Wigmore includes no such ground in his great work. Strangely, he gives a perfect example of such a question from Hardy's State Trial, 24 How. St. Tr. 754 (1794), even down to the admonition of the judge that the comments counsel had dressed up as questions were objectionable during examination though "they are the proper subject of observation when defense is made." Wigmore inserted this example under "Misleading Questions." 3 WIGMORE, note 3 *supra*, at § 780, p. 171. See also the examination in Ing's Trial, 33 How. St. Tr. 957, 999 (1820), which Wigmore placed under "Intimidation." 3 WIGMORE, note 3 *supra*, at § 781, p. 181.

139. See text at note 12 *supra*.

witness evaluates the evidence, but to argue to the jury the incredibility of the testimony.

An intimate relationship exists between such "argumentative questions"¹⁴⁰ and one facet of the so-called "rule" against opinion testimony by lay witnesses. One of the main objectives behind the prohibition on nonexpert "opinion" is to prevent a witness from testifying to inferences which could as accurately be drawn by the jury. A question looking for an answer containing that kind of objectionable "opinion" is argumentative. On direct, however, it is more common to make the objection that the question "calls for opinion," while on cross, where a favorable "opinion" from the witness is not really expected in reply, the objection usually emphasizes the argumentative nature of the question.

Earlier we mentioned the propriety of leading questions used for so-called "transitions" between topics of inquiry.¹⁴¹ Yet, transitional questions often contain repetitive information not intended to lead, but designed to refresh both the witness' and the *juror's* memory concerning certain facts so that the subsequent answers are in clear context. Such "transitions" present fertile ground for improper argumentation. Whether specifying information necessary or helpful to a clear understanding of subsequent testimony (which should be allowed) crosses the line to become improper argumentation (which should not be allowed) depends on considerations such as the connotations of the words selected, the constructions used, etc. Bearing in mind the principles just discussed, each decision must be based on the context in which the transition is made. Yet, the judge should always remember the objector has a legitimate right to be protected against improper argumentation during the production of evidence.

Controlling argumentative editorial comment during the questioning process can be extremely difficult. Again, because of the restrictions already imposed on direct examination, most problems appear during cross. First, there is the difficulty of recognizing the editorial dimension of a question. From a cross-examiner's standpoint, the best questions are those where the editorial dimension is subtle and subliminal, but effective. This technique makes such questions hard to resist and difficult to recognize. Indeed the art of cross-examination is often thought to involve the development of such Svengali-like skills, and the only argumentative question which is viewed as improper is the one disallowed by the judge. We suppose subtle editorializing which escapes detection is allowable edi-

140. We must here note that the label "argumentative" is not really very satisfactory, since it seems to connote "arguing with a witness" rather than "arguing to the jury." However, it is the label which has been used and we have been unable to coin a more satisfactory alternative.

141. See text at note 71 *supra*.

torializing, but whether this result is a matter of principle or default is hard to say. Even when comment and analysis by the attorney become so obvious as to be identifiably improper, argument is hard to control. Striking the question with an explanation may merely emphasize the editorial. In isolated cases of misconduct any greater sanction seems to be too much, especially since some lawyers do not understand the difference between an argumentative and a non-argumentative question any better than the difference between a leading and a non-leading question. Further, some attorneys are simply intransigent editorializers throughout the questioning process, while many more may yield to the temptation to make a telling point *now* rather than wait a week for closing arguments to do so.¹⁴² Faced with such a situation, a judge may have to resort to the full range of possible responses and sanctions previously discussed,¹⁴³ in order to control the presentation of evidence as theoretically intended. Restricting improper editorializing in front of the jury between two combative lawyers is one of a judge's most difficult tasks.

QUESTIONS WHICH COVER OLD GROUND (ASKED AND ANSWERED/BADGERING THE WITNESS)

No absolute prohibition exists against questions which cover redundant information on either direct or cross.¹⁴⁴ Thus the incantation "asked and answered" is a misplaced objection.¹⁴⁵ As in the case of "transitional questions," the direct examiner should be allowed to cover old ground, when necessary, to present all information in context and intelligently reveal relevant interconnections in the evidence.¹⁴⁶ To go beyond this level on direct is cumulative, and redundant. It is usually done for improper editorial emphasis, and is therefore objectionably argumentative.

A mechanical "asked and answered" objection directed at cross-examination makes even less sense. By definition cross-examination covers ground which is at least broken on direct. Allowing an "asked and answered" objection here would restrict cross-examination almost out of existence. A cross-examiner must have leeway to approach the previously given information from different angles to see if the responses remain consistent. Thus, going over the same ground twice on cross is not itself automatically objectionable.¹⁴⁷ When, however, it becomes obvious that the

142. See the recognition of this fact in R. KEETON, note 3 *supra*, at § 3.22, p. 141.

143. See text at note 86 *supra*.

144. 3 WIGMORE, note 3 *supra*, at 782.

145. Although misplaced, such an objection is common. See B. JEFFERSON, note 3 *supra*, at § 27.4, and A. BOCCHINO, NO. CAROLINA TRIAL EVIDENCE MANUAL 5 (1976).

146. 3 WIGMORE, note 3 *supra*, at § 782(2).

147. *Id.* at § 782(3) & § 782(4).

examiner is merely trying to wear down the witness (without apparent progress) the court should entertain an objection based on redundancy.¹⁴⁸ This phenomenon is usually known as badgering the witness, though the objection in its more inelegant and ineffective forms is sometimes called arguing with the witness ("did you do it?" "no!" "yes, you did, didn't you." "No I didn't!", etc.). This problem should not be confused with the argumentative question discussed above.

Control of badgering is not difficult. The court need only sustain an appropriate objection when questioning goes too far. The examiner, however, should probably receive the benefit of any doubt concerning what is "too far" since little risk of unfairness to the opponent exists in letting a process continue that is merely repetitive. In any event reiteration and badgering is usually ineffective or counter-productive on cross-examination.

ABUSE OF THE WITNESS BY THE QUESTIONING PROCESS: INTIMIDATION

Intimidation does not flow primarily from the question, but from the style of the interrogator. Here we refer to the raised voice, the threatening manner, the looming approach to the witness stand, etc. Intimidation to a disturbing degree is likely to be encountered only on cross-examination. The witness' awareness that counsel is trying to shake her story and the usual pointedness of questioning means that a certain amount of intimidation is almost necessarily present on cross-examination. (Note that although badgering and intimidation often go together, theoretically one can be done without the other.) Intimidation beyond some inherent minimum has several potential effects. Some argue intimidation may throw the deceiver off balance so that her deception may be discovered. Others suggest the honest witness may be unfairly scared into looking reluctant, confused or less than frank. Bentham thought the balance of the argument so favored those who found intimidation by counsel to be a source of distortion to honest testimony that he nearly went so far as to espouse cross-examination in a monotone from behind a screen.¹⁴⁹ Still, the usual wisdom is that what may overbear one witness to the detriment of the truth, may be necessary to set up another witness to give the truth. Although there are complaints that judges do not adequately protect wit-

148. *Id.* at § 782(4). See note 105 *supra*.

149. The image is ours but those who doubt the accuracy of the impression so conveyed should examine J. BENTHAM, note 3 *supra*, at Bk. II, Ch. 9, & Bk. III, Ch. 5. "On the demeanor of the adverse interrogation to the witness, considered in respect of vexation." *Id.* at 80-88, partially quoted at 3 WIGMORE, note 3 *supra*, at § 781.

nesses from unwarranted intimidation,¹⁵⁰ the final decision concerning the balance between an attempt to reveal the truth and unfair intimidation is generally left to the judgment of the trial court.

ABUSE OF THE WITNESS: QUESTIONS WHICH ARE
"HUMILIATING," "INSULTING," "VEXATIOUS," OR
"HARASSING."

There is authority that an objection based on abuse of the witness exists, and there are even statutory provisions in some states to that effect.¹⁵¹ Yet, these labels do not create a ground for objection *per se*. They are names rhetorically used against irrelevant or argumentative questions to emphasize impropriety which goes beyond mere irrelevance or argumentation. Relevant questions properly framed are not rendered objectionable¹⁵² by the fact that they may insult a witness, embarrass him, or be vexatious or harassing to him.¹⁵³

150. See Maracin, *Incompetent, Insensitive, In Step with the System*, 5 *The Barrister* 1 (1978). See also 3 WIGMORE, note 3 *supra*, at § 984(3).

151. Usually such statutes are qualified by the word "undue." See the statutory provisions and other authorities collected at 3 WIGMORE, note 3 *supra*, at § 781 n.4.

152. One must distinguish the assertion that a question is degrading as ground for objecting to the question from the assertion that the degrading nature of the question and answer gives the witness a privilege to refuse to answer the question. The privilege seems to be more widely recognized than the ground of objection to the question, and also to be recognized under more circumstances where the answer might be relevant either directly to the case or for impeachment purposes. See generally Annot., *Refusal to Answer Degrading Questions*, 88 A.L.R.3d 304 (1978). The exact rationale and structure of this privilege seems to be in a peculiarly chaotic state from jurisdiction to jurisdiction, and its wisdom somewhat suspect, but a detailed discussion of it is beyond the scope of this article.

153. See S. GARD, *JONES ON EVIDENCE* § 25.13 (6th ed. 1972) and cases there cited at n.13; B. JEFFERSON, note 3 *supra*, at § 27.10. Jefferson gives the following instructive illustrations:

(1) (Asking the witness an embarrassing question for purpose of impeachment), X is prosecuted for burglary. His defense is an alibi. B, a girl friend, testifies for X in corroboration of the alibi. On cross examination of B, the prosecutor asks: "Isn't it true that for the last six months you have been secretly living with X, although you are not married to him?" X objects that the question is insulting and is an attempt to embarrass the witness. The objection should be overruled.

In Illustration (1), the question asked of B might be embarrassing, but it does not constitute undue embarrassment. Since B has testified for X, her credibility is open to attack by the prosecutor. Living with X without the benefit of marriage is a fact that would tend to establish B's bias in favor of X. The question asked is thus relevant even though embarrassing. Evidence Code § 765 does not prohibit the asking of embarrassing questions, but only those which can be deemed unduly embarrassing under the circumstances. The question in Illustration (1) does not appear to fall in the latter category.

(2) (Asking a witness an embarrassing question when relevancy is doubtful or weak). Assume the same facts as in Illustration (1). On cross-examination of B, the prosecutor asks: "Isn't it true that you are the mother of three children fathered by X, to whom you are not married?" X objects that the question is improper impeachment and undue embarrassment to the witness. The objection should be sustained.

In Illustration (2), the question asks about specific acts of misconduct and does not

CONCLUSION

We believe objections based on the form of questions can only be productively viewed as being appeals to a trial judge's discretion which is structured and limited by a well developed system of principles. We have tried to explore the principles which should guide a questioner in framing questions, an opponent's decision to object to a question as improper and a judge's ruling on such an objection. The striking observation is that although the natural assumption seems to be that the form of the question is most often a problem on direct examination (because of the prohibition on improper leading), it is the cross-examiner who most often faces the temptation to frame unfair questions. While improper leading or argument occurs on direct, it is on cross where questions usually appear containing improper implications of fact, improper implications of the existence of incompetent evidence, trick assumptions, unfair ambiguities, unfair lack of specificity, improper badgering, and improper attempts at intimidation in addition to improper argumentation. Every examiner should attempt to avoid these devices; every opponent must be alert for their appearance and familiar enough with the law to point them out effectively when they appear; and every judge has the duty to control them. Only then may examination of witnesses serve its great purposes in a fair, disciplined, principled and responsible way.

touch on the character-credibility traits of honesty or veracity or their opposites. Perhaps it could be argued that B's conduct establishes a fact of bias in favor of X, but this reasoning seems farfetched in view of assuming that B has answered the previous question and has admitted living with X without the benefit of marriage, which establishes the fact of bias. Even if the view is accepted that the question is relevant to attack B's credibility on a theory of showing bias, the question seems clearly designed to cause B undue embarrassment that far outweighs its relevancy. The objection, therefore, should be sustained.

Id. at § 27.10.